

Rethinking Surrogacy Laws
Te Kohuki Ture Kopu Whangai

Surrogacy and Human Rights in New Zealand

Rhonda Powell and Natalie Baird

May 2020

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ACKNOWLEDGMENTS

Acknowledgments

Natalie and Rhonda would like to acknowledge the valuable contributions to this Report provided by Professor Annick Masselot and research assistants Holly Faulkner, Amy Oliver and Elizabeth O’Sullivan. We are especially grateful to Amy Oliver for her assistance in finalising this Report.

Funding Support

This project was generously funded by the New Zealand Law Foundation and the School of Law, University of Canterbury.

TABLE OF ACRONYMS

ACART	Advisory Committee on Assisted Reproductive Technology
ART	Assisted Reproductive Technology
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
Code of Rights	Health and Disability Commissioner (Code of Health and Disability Services Consumer Rights') Regulations 1996
CRC	Convention on the Rights of the Child
CRC-OPCP	Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
CRC-OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
CRPD	Convention on the Rights of Persons with Disabilities
CRS	Convention on the Reduction of Statelessness
CSSP	Convention relating to the Status of Stateless Persons
ECART	Ethics Committee on Assisted Reproductive Technologies
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court on Human Rights
ESC rights	Economic, social and cultural rights
HART Act	Human Assisted Reproductive Technologies Act 2004
HRC	Human Rights Committee
HRRT	Human Rights Review Tribunal
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IVF	In Vitro Fertilisation
MBIE	Ministry of Business, Innovation and Employment
NZBORA	New Zealand Bill of Rights Act 1990
Siracusa Principles	Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization

PART ONE: INTRODUCTION

Rethinking Surrogacy Laws / Te Kohuki Ture Kopu Whangai

In a surrogacy arrangement, a woman (the surrogate) carries out a pregnancy and gives birth to a child for another person or persons (the intended or commissioning parent(s)) to raise. Surrogacy arrangements are complex and raise many legal, ethical and cultural issues. They include issues surrounding child welfare, reproductive freedom, exploitation of the surrogate, commodification of the child, immigration, citizenship and custody. Amongst these issues is the potential impact of the surrogacy arrangement on the rights of the parties involved – the surrogate mother, the intended parent(s) and the resulting child or children.

Surrogacy, particularly international surrogacy, where the intended parent(s) and the surrogate live in different countries, is an increasingly prevalent form of artificial reproduction. For example, statistics from the Ethics Committee on Assisted Reproductive Technology (ECART), which authorises applications for assisted reproductive procedures within New Zealand, suggest an increase in surrogacy-related applications.¹ ECART began hearing applications in 2005, and in that year heard 12 applications for surrogacy. From 2006–2009 it heard 18–19 applications per year, approving 16–17 per year. By 2014–2015, this had increased to 22 and 25 applications respectively with 20 applications approved in each year. In each of 2017 and 2018, there were 29 applications, with 6 approved in 2017, and 19 approved in 2018. Overall, ECART has heard 291 applications to the end of 2018. Of these, 187 were approved outright, 51 were approved with some conditions, 10 were declined, and 16 were deferred (with most being approved in subsequent meetings). Statistics on international cross-border surrogacy are more difficult to find. As international surrogacies tend to involve payment to the surrogate and intermediaries and are prohibited in many countries, intended parents may attempt to ‘hide’ the arrangement.

The popularity of surrogacy, and the potentially devastating impact on the parties to the arrangement should something not go according to plan, particularly with international surrogacy arrangements, suggest a pressing need for legal attention. Since 2015, researchers at the University of Canterbury have been examining the legal, ethical, cultural and societal implications of surrogacy arrangements in New Zealand. Led by principal investigators Debra Wilson, Rhonda Powell and Annick Masselot, the *Rethinking Surrogacy Laws/Te Kohuki Ture Kopu Whangai* project involves critical and comparative legal analysis as well as qualitative interviews with industry stakeholders, policy makers and interest groups.

Rethinking Surrogacy Laws/Te Kohuki Ture Kopu Whangai aims to answer the following questions:

- What are the views on surrogacy held by people or groups in New Zealand and are there identifiable reasons underpinning these views?
- What policy objectives should a model law or best practice guide incorporate?
- Does the current law reflect these policy goals?
- What are the various options for law reform which might better reflect these policy goals?
- What would a model surrogacy law look like?

¹ *Child Law* (online ed, Westlaw) at [5.4].

Rethinking Surrogacy Laws/Te Kohuki Ture Kopu Whangai has been generously funded by the New Zealand Law Foundation, and supported by the University of Canterbury School of Law Research Committee.

Surrogacy and Human Rights

As a contribution to the *Rethinking Surrogacy Laws* project, this Report sets out the core human rights relevant to three of the key actors in any surrogacy arrangement – the surrogate, the child and the intended parent(s). It focuses specifically on human rights recognised in law, as opposed to those recognised in moral philosophy. It explains the international legal basis of each right and then analyses in turn what each right requires, the application of each right in the surrogacy context, and the application of each right in the surrogacy context in New Zealand. Each section concludes with questions to be addressed in any future review of the regulatory and policy framework for surrogacy in New Zealand. We intend that this Report be used as a resource document by those concerned with and interested in surrogacy law reform in New Zealand.

The Core Human Rights at Stake

There is no particular international human rights treaty that directly or comprehensively addresses the human rights of surrogate mothers. There are however several rights of particular relevance to surrogate mothers: the right to health, the right to privacy and employment rights. New Zealand does reasonably well in protecting the right to health of surrogate mothers based in New Zealand. It can be argued that the right to privacy of surrogate mothers in New Zealand is currently limited as a result of the prohibition on commercial surrogacy arrangements in New Zealand, and the inability to enforce a surrogacy contract. In the current absence of a clear Government statement as to the rationale for these limits, it is difficult to assess whether these limits on a surrogate's right to privacy can be justified. Aside from the right to health and the right to privacy, a surrogate mother may have various employment rights including the right to work and the right to just and favourable conditions of employment. Whether or not it is appropriate to view surrogacy, even paid surrogacy, through the lens of employment, a surrogate may be engaged in other employment and so would have recognised rights in relation to that employment.

In relation to the child born of a surrogacy arrangement, the United Nations Convention on the Rights of the Child (CRC), ratified by New Zealand, sets out the key rights. Foremost amongst these is the overarching obligation to consider the best interests of the child. There is room for New Zealand to improve its recognition and application of the best interests principle in the surrogacy context both in terms of statutory provisions and practical guidance. Other important rights for children born of a surrogacy arrangement are the right to nationality and the right to identity. These rights are currently reasonably well protected for surrogacy arrangements in New Zealand. Concerns with realisation of these rights mostly arise in relation to international surrogacy arrangements entered into by New Zealand based intending parent(s). Given the cross-border nature of international surrogacy arrangements, it is difficult to comprehensively regulate for them in New Zealand. In relation to commercial surrogacy arrangements, a key threshold issue is whether the right of a child not to be sold is breached by such an arrangement. Given its threshold nature, the issue of sale of children requires resolution at the international level, and in particular a definitive view on whether and in what circumstances commercial surrogacy arrangements will breach the prohibition on sale of children.

The human rights most relevant to the intended parent(s) in a surrogacy arrangement include the right to reproduce and the right to share in the benefits of scientific advancement. There is no internationally recognised right to reproduce, but it is usually linked to one or more of the rights to marry and found a family, the right to health and the right to respect for private and family life. In New Zealand, one of the main issues arising in the context of the right to reproduce is the need to ensure that access to fertility services (including surrogacy) is provided on a non-discriminatory basis. The right to science has some relevance to the rights of intended parent(s) in the surrogacy context, but is currently under-developed both internationally and in New Zealand.

Dealing with Conflicts between Rights in the Surrogacy Context

Rights express different individual interests and demands upon states. Humans' social existence however may mean that two or more rights cannot be realised simultaneously, causing a rights conflict. Human rights law has developed two approaches for addressing rights conflicts: definitional balancing and ad hoc balancing.² Definitional balancing requires the decision maker to define the rights as narrowly as possible.³ With each right being given only a narrow meaning, any rights conflict is removed and individuals can exercise rights harmoniously.⁴ An alternative approach is ad hoc balancing. Adopted in European Court of Human Rights (ECtHR) jurisprudence, this approach requires decision makers to consider the necessity of any limitation on a right in achieving a necessary social goal and the proportionality of the limitation in relation to its legitimate aim.⁵ Through considering the necessity and proportionality of any limitation on a right, the decision maker can determine what compromises appropriately allow the realisation of multiple conflicting rights. New Zealand courts have adopted both definitional and ad hoc balancing approaches in resolving rights conflicts, leaving the law in this area "confused".⁶

Within the surrogacy context the tripartite nature of a typical surrogacy arrangement may lead to different rights conflicts. One example of a potential conflict of rights may arise where a surrogate develops health complications during her pregnancy and wishes not to carry the child to full-term, causing a potential conflict between the surrogate's rights to health and liberty and security of the person and the intending parent(s)' right to reproduce. Another example of a potential conflict of rights in the surrogacy context is where a state determines that the best interests of the child requires an assessment of the parenting ability of intending parent(s). Assessing the intending parent(s)' parenting ability may interfere with their right to privacy and family life, but failure to assess parenting ability may be contrary to the child's best interests.

Analysis of jurisprudence addressing rights conflicts between parents and children may help understand how decision makers would determine a rights conflict in the surrogacy context. In the New Zealand decision of *Re J (An Infant): B and B v Director-General of Social Welfare*, the Court of Appeal considered a conflict between parents' rights to freedom of belief under s 15 of the New Zealand Bill of Rights Act 1990 (NZBORA) and a child's right to life under s 8 of that Act.⁷ In resolving

² Dr A S Butler and Dr P Butler *Laws of New Zealand Human Rights* (online ed) at [53].

³ *Re J (An Infant): B and B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA) at 146.

⁴ At 146.

⁵ *Pretty v United Kingdom* (2002) 35 EHRR 1 (ECHR) at [70].

⁶ Butler and Butler, above n 2, at [53].

⁷ *Re J (An Infant)*, above n 3, at 146.

the conflict the Court adopted a definitional approach, finding that the parents' right to manifest their religious beliefs could not extend to endangering B's life.⁸

Outside of judicial decisions, several sources have advocated for the application of an ad hoc balancing approach in resolving rights conflicts in this area. The Committee on the Rights of the Child, the United Nations treaty body that monitors compliance with the CRC, has noted that conflicts between other rights and the best interests of the child should be resolved on a case-by-case basis.⁹ In the context of the necessity of parenting assessments to protect a child's best interests, John Tobin has suggested that any interference or limitation on the parent(s)' right to privacy and family life would need to be justified as a proportionate measure to achieve a legitimate aim.¹⁰ Whether a parenting suitability assessment is a proportionate measure would depend on the nature and extent of the assessment in any given case although Tobin notes that "although this issue may be contentious, it would arguably fall within a State's margin of appreciation to insist upon such an assessment".¹¹

New Zealand Courts' lack of acceptance of a single approach to resolving rights conflicts and the differing approaches taken overseas means that it is currently unclear how rights conflicts would be addressed in the surrogacy context. Although globally there seems to be a trend towards ad hoc balancing, it is possible that jurisdictions may develop different approaches to determining rights conflicts in the surrogacy area, causing significant complexity and uncertainty for transnational surrogacy arrangements.

Future Law Reform

We believe that reform of New Zealand's law relating to surrogacy is needed urgently. In addition, we believe that any future law reform exercise will need to ensure consistency with New Zealand's international human rights obligations. It is suggested that the human rights obligations covered in this Report be used as a yardstick to underpin any future reform. Part Five of this Report collates the key human rights questions requiring consideration in any future reform.

⁸ *Re J (An Infant)*, above n 3, at 146. The Court relied on the Canadian Supreme Court decision in *B(R) v Children's Aid Society of Metropolitan Toronto* (1995) 1 SCR 315.

⁹ Committee on the Rights of the Child *General Comment No 14: on the right of the child to have his or her best interests taken as a primary consideration* UN Doc CRC/C/GC/14 (29 May 2013) at [39].

¹⁰ John Tobin "To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?" 2014 63(2) ICLQ 317 at 333.

¹¹ At 333.

PART TWO: RIGHTS OF THE SURROGATE

Introduction

There is no particular international human rights treaty that directly addresses the human rights of surrogates. Nevertheless, there are several relevant rights recognised in international human rights law, primarily:

- the right to health;
- the right to privacy;
- the right to work and the right to just and favourable working conditions; and
- the right to freedom from discrimination.

The Surrogate's Right to Health

The international legal basis of the right

The right to health was first articulated in 1946 in the Constitution of the World Health Organization, which defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.¹²

The right to health is recognised in art 25 of the Universal Declaration of Human Rights (UDHR) as an aspect of the right to an adequate standard of living. The same article recognises that motherhood is entitled to “special care and assistance”.¹³

The clearest and most direct iteration of the right to health is art 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), which reads: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁴ New Zealand ratified the ICESCR in 1978 and is therefore bound by its terms at international law. New Zealand has not ratified the Optional Protocol to the ICESCR which provides for an individual complaint mechanism.¹⁵

The right to health is also included in art 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁶ In addition to requiring states to “take all appropriate measures to eliminate discrimination against women in the field of health care”, art 12(2) requires states to ensure that women have appropriate services in connection with pregnancy and birth. New Zealand ratified CEDAW in 1985, and the Optional Protocol to CEDAW which provides for an individual complaint mechanism in 2000.¹⁷

¹² Constitution of the World Health Organization 14 UNTS 185 (opened for signature 22 July 1946, entered into force 7 April 1948).

¹³ *Universal Declaration of Human Rights* GA Res 217 A (1948) [UDHR], art 25(2).

¹⁴ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) [ICESCR].

¹⁵ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* GA Res 63/117, A/63/435 (opened for signature 24 September 2009, entered into force 5 May 2013).

¹⁶ Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 1 (opened for signature 18 December 1979, entered into force 3 September 1981) [CEDAW].

¹⁷ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* 2131 UNTS 83 (opened for signature 10 December 1999, entered into force 22 December 2000) [OP-CEDAW].

The right not to be discriminated against on the ground of health has been proclaimed by the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹⁸ and the Convention on the Rights of Persons with Disabilities (CRPD).¹⁹

What does the right to health require?

The Committee on Economic, Social and Cultural Rights (CESCR), the United Nations treaty body that monitors the ICESCR, interprets the right to health to include the underlying determinants of health, such as access to fresh water, housing, food and sanitation; a healthy occupational environment; education on sexual and reproductive health; and participation in health policy decision-making.²⁰

According to the CESCR, healthcare facilities must be:

- available;
- accessible (economically, physically, without discrimination, and with information accessibility);
- acceptable (taking into account gender and cultural dynamics); and
- of good quality.

The right to health includes a number of freedoms, and in particular the freedom to control one's health and body, sexual and reproductive freedom, the freedom from forced medical treatment and freedom from torture or other cruel, inhuman or degrading treatment.²¹

The right to health includes entitlements, such as a system of health protection and equal opportunities to enjoy the highest attainable standard of health.²²

The ICESCR provides for progressive realisation of the rights protected, including the right to health, and acknowledges the constraints placed on states by limits in availability of resources.²³ Nevertheless, states are immediately obliged to take deliberate, concrete and targeted steps towards realisation of the rights and to guarantee that the rights are exercised without discrimination.²⁴

The right to health in the surrogacy context

The surrogate's right to health extends to her physical, psychological and sociological well-being. The preconditions to her health should be guaranteed, such as adequate shelter, clean and potable water, sanitation and nutrition.

A critical issue in the surrogacy context is the ability for the surrogate to exercise control over her pregnancy. Research suggests that it is common in some international surrogacy clinics for clinical

¹⁸ International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 1 (opened for signature 21 December 1965, entered into force 4 January 1969) [CERD], art 5(e)(f).

¹⁹ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008) [CRPD], art 25.

²⁰ United Nations Committee on Economic, Social and Cultural Rights *General Comment No 14: The right to the highest attainable standards of health* UN Doc E/C.12/2000/4 (11 August 2000) at [4].

²¹ At [8].

²² At [8].

²³ ICESCR, art 2.

²⁴ ICESCR, art 2.

decisions to be made about the surrogate's pregnancy, and for medical procedures to be performed, without her informed consent.²⁵

Accessibility of information is important in the surrogacy context. This refers to information being provided to the surrogate about what the in-vitro fertilisation (IVF) process entails, and her pregnancy more generally, to enable her to make decisions about her medical care. Research suggests that, in some international surrogacy clinics, surrogates may be denied full information about the medical procedures they will be subjected to.²⁶

The right to health requires that a surrogate should receive antenatal, intrapartum and postnatal healthcare of an adequate standard. The right is to progressive realisation of the right to health, subject to available resources.

Pregnancy entails a number of natural risks, some of which may be exacerbated by medical decisions in the surrogacy context. For example, it is common in some countries to implant multiple embryos in the surrogate, which may lead to higher-risk multiple pregnancies or the need for a foetal reduction procedure.²⁷ This raises questions about discriminatory or unethical treatment of surrogates, who may be put at greater medical risk than other birthing women.

Although there are risks associated with all births, caesarean sections, which are common for international surrogacy arrangements,²⁸ lead to increased health risks for the woman. These include blood loss, wound infection, deep vein thrombosis, pulmonary embolism, damage to the bladder, and risks associated with anaesthetic. These risks are exacerbated in future pregnancies,²⁹ and it is possible that women who act as surrogates in places like India and Thailand may not be able to afford the specialised medical care required for pregnancy after a caesarean section.³⁰

Any pregnancy, including surrogate pregnancies, may present mental health risks to the surrogate, including post-partum depression. There is therefore a need for psychological and social support for surrogates during the pregnancy and after the birth. The practice in some centres of isolating surrogates from their communities in order to exert greater control over their pregnancies may be a contributing factor to post-partum depression.³¹

Social risks may result if surrogates are separated from their families and communities, as is the practice in some overseas clinics. In some places this may include separation from young children. On

²⁵ Pip Trowse and Donna Cooper "The Agony and the Ecstasy: Sacrifice and Pain for Financial Gain: Have Indian Surrogate Mothers Been Exploited by Their Intended Parents in Commercial Surrogacy Arrangements?" (2018) 25 JLM 388 at 401-405; Malene Tanderup et al "Reproductive Ethics in Commercial Surrogacy: Decision-Making in IVF Clinics in New Delhi, India" (2015) 12 Bioethical Inquiry 491 at 494.

²⁶ Trowse and Cooper, above n 25, at 403-404; Tanderup et al, above n 25, at 494.

²⁷ Trowse and Cooper, above n 25, at 403; Tanderup et al, above n 25, at 496-497.

²⁸ See Amrita Pande *Wombs in Labor: Transnational Commercial Surrogacy in India* (Columbia University Press, New York, 2014), Table AP-2 showing data on surrogates delivering at one Indian surrogacy clinic in 2007. Of 40 women, 38 had had at least one previous natural birth and yet only two had vaginal births of their surrogate children (two were yet to deliver).

²⁹ The Royal Australian and New Zealand College of Obstetricians and Gynaecologists "Caesarean Section" <<https://www.ranzcog.edu.au/Womens-Health/Patient-Information-Resources/Caesarean-Section>>.

³⁰ Nicole F Bromfield and Karen Smith Rotab "Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations" (2014) 1 Glob Soc Welf 123 at 127.

³¹ At 127.

the other hand, some surrogates have stated that their living conditions are higher while living in the clinic than they would be otherwise, or that they enjoy the opportunity to rest.³²

Realising the right to health in New Zealand in the surrogacy context

Many of the potential concerns around the surrogate's right to health are relevant in the international context but less likely to be in issue in New Zealand.

The only surrogacy-specific health regulation in New Zealand is the guideline issued by the Advisory Committee on Assisted Reproductive Technology (ACART) on surrogacy involving assisted reproductive procedures.³³

The ethical approval process required for assisted reproductive treatment in New Zealand applies to surrogacies involving IVF or other fertility treatment.³⁴ In considering whether to approve an application for an assisted reproductive procedure involving surrogacy, ECART must consider whether the surrogate has received counselling.³⁵ There is no financial provision for the psychological or social care of surrogates. Nor is there a formal process to see that she obtains appropriate support before and after the birth.

New Zealand offers free antenatal, intrapartum and postnatal care to most women.³⁶ This usually involves continuity of care by a lead maternity carer, who is usually a midwife but can be a general practitioner or obstetrician. Midwifery care before, during and for 4-6 weeks after the birth, may be provided in a clinic, at the woman's home, or in a public or private hospital. Midwifery care in New Zealand is normally holistic and incorporates psychological and social support as well as health promotion, screening, risk assessment, and education related to pregnancy and birth.³⁷ Surrogates are entitled to the same public health services as other pregnant women.

Beyond the care provided by her midwife, there is no specific provision for the additional mental health care that may be necessary to support a surrogate through her pregnancy and after relinquishing the infant. New Zealand has some provision for publicly funded mental health services, which are accessible through general practitioners.

The Code of Health and Disability Services Consumers' Rights (Code of Rights) details both patient rights and the corresponding duties of health practitioners.³⁸ Rights relevant to surrogacy include:

Right 1: The right to be treated with respect;

Right 2: The right to freedom from discrimination, coercion, harassment and exploitation;

³² See Pande, above n 28, at 74-83.

³³ Advisory Committee on Assisted Reproductive Technology *Guidelines on surrogacy involving Assisted Reproductive Procedures* (ACART Guidelines) (December 2013).

³⁴ HART Act, s 27.

³⁵ ACART Guidelines, above n 33.

³⁶ Health and Disability Services Eligibility Direction 2011.

³⁷ The statement of Philosophy of the New Zealand College of Midwives includes: "Midwifery is holistic by nature: combining an understanding of the social, emotional, cultural, spiritual, psychological and physical ramifications of women's reproductive health experience, actively promoting and protecting women's wellness; promoting health awareness in women's significant others." See New Zealand College of Midwives "Philosophy and Code of Ethics" <<https://www.midwife.org.nz/midwives/professional-standards/philosophy-and-code-of-ethics/>>.

³⁸ Health and Disability Commissioner (Code of Health and Disability Services Consumer Rights') Regulations 1996 [Code of Rights].

Right 3: The right to dignity and independence;

Right 4: The right to services of an appropriate standard;

Right 5: The right to effective communication;

Right 6: The right to be fully informed;

Right 7: The right to make an informed choice and give informed consent; and

Right 8: The right to support.

The Health and Disability Commissioner considers allegations of breach of the Code of Rights, including in the context of maternity care.

The right to refuse medical treatment is also protected by s 11 NZBORA, although there are limited remedies available for breaches. This right includes the ability to make decisions related to IVF treatment, abortion, foetal reduction, antenatal screening tests and caesarean section births.

It is unclear how well the surrogate's right to make decisions about her pregnancy is protected in practice (particularly against the expectations of intended parents) due to insufficient research on surrogates in New Zealand. This question would become even more pressing if surrogacy contracts were enforceable in New Zealand. At present, s 14 of the Human Assisted Reproductive Treatment Act 2004 (HART Act) renders them null and void.

Anecdotal reports suggest some confusion as to the rights and obligations in relation to the infant when surrogates give birth in hospital. This may cause unnecessary stress to the surrogate (and intended parents).

Questions about New Zealand's current approach to the right to health

The following questions arise in relation to New Zealand's current approach to the surrogate's right to health:

- How can New Zealand best respect, protect, and fulfil the surrogate's rights to psychological and social support during the pregnancy and after the birth?
- How can New Zealand promote clinical decision-making in relation to surrogate pregnancies that minimises physical and psychological risks to the surrogate?
- How can New Zealand best respect, protect, and fulfil the surrogate's right to exercise control over her body during the pregnancy and birth?
- If s 14 of the HART Act were amended or repealed such that surrogacy contracts could be enforced, how would the surrogate's rights to exercise control over her body during the pregnancy and birth be protected?
- What could New Zealand do to facilitate rights-consistent processes and procedures in hospitals for surrogate births?

The Surrogate's Right to Privacy

The international legal basis of the right

The right to privacy is based on the liberal value of minimising unjustified state interference with an individual's personal affairs. This right has been recognised by the common law since the 18th century,³⁹ and is the foundation of a variety of common law and statutory rights that are part of New Zealand law.⁴⁰ The right to privacy is widely recognised as a core part of international human rights law, and is included in art 12 UDHR.

The most relevant iteration of the right to privacy is art 17 of the International Covenant on Civil and Political Rights (ICCPR), which states that: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".⁴¹ New Zealand ratified the ICCPR in 1978 and the Optional Protocol to the ICCPR in 1989. The Optional Protocol to the ICCPR provides a mechanism for individual complaints to the United Nations Human Rights Committee (HRC).⁴²

A broader formulation of right to privacy, the right to private life, is recognised in several regional human rights instruments, although none of these apply to New Zealand.⁴³

What does the right to privacy require?

Article 17 has a broad meaning and extends to issues such as state surveillance; bodily searches; expression of one's identity (including name changes, legal identity, and religious identity); protection of the family; protection of the home; and interception of correspondence.⁴⁴

Complaints about breaches of the right to privacy under the ICCPR often also invoke the rights to non-discrimination (arts 2 and 26 ICCPR) and family life (art 23 ICCPR).

The right to privacy is directly relevant to sexual and reproductive matters and has been invoked in HRC proceedings under the individual complaint mechanism related to the criminalisation of homosexuality⁴⁵ and denial of access to lawful abortion.⁴⁶

The right to privacy is not absolute. The text of art 17 allows for limitations provided they are not unlawful or arbitrary.

³⁹ *Entick v Carrington* (1765) 95 ER 807 (Comm Pleas).

⁴⁰ Paul Roth "Privacy, Autonomy and Family Life" in Margaret Bedgood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 421 at 422.

⁴¹ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR], art 17(1).

⁴² Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

⁴³ European Convention on Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR), art 8 and American Convention on Human Rights 1144 UNTS 123 (opened for signature 22 November 1969, entered into force 18 July 1978), art 11.

⁴⁴ See generally Roth, above n 40. United Nations Human Rights Committee *General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* XXXII (8 April 1988).

⁴⁵ See for example *Toonen v Australia* UN Doc CCPR/C/50/D/488/1992 (31 March 1994).

⁴⁶ *VDA v Argentina* UN Doc CCPR/C/101/D/1608/2007 (29 March 2011) and *KL v Peru* UN Doc CCPR/C/85/D/1153/2003 (24 October 2005).

At international law, any limitation in a human right is to be interpreted strictly and in favour of the rights-holder.⁴⁷ It should also be subject to the possibility of challenge so as to provide a remedy for any abuse.⁴⁸ The state holds the burden of justifying limitation of rights.⁴⁹

When a limitation is stated to be necessary, this means that the limitation:⁵⁰

- (a) is based on one of the grounds justifying limitations recognised by the relevant article of the covenant;
- (b) responds to a pressing public or social need;
- (c) pursues a legitimate aim; and
- (d) is proportionate to that aim.

In the case of the ICCPR, the HRC has stated that, although limitations on the right to privacy are permissible if they are in accordance with the law, any law that limits the right must itself be consistent with the aims and objectives of the ICCPR:⁵¹

“The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”

The rights of others (such as children) and the need to protect public morality may each be legitimate aims. In order to invoke public morality as a ground to limit human rights, the state “while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.”⁵² This logically requires a view to be taken about the fundamental values of the community in question. The greater the disagreement amongst the community about a particular issue, the harder it will be to justify limiting a human right based on the values of the community.

The right to privacy in the surrogacy context

In the context of surrogacy, the surrogate’s right to privacy extends to her right to reproductive autonomy, which includes the right to make decisions about:

- whether to enter into a surrogacy arrangement; and
- the medical management of her pregnancy and birth.

Decision making in childbirth has been considered by the ECtHR in relation to art 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) concerning the right to respect for privacy and family life, home and correspondence. In considering whether a state’s

⁴⁷ American Association for the International Commission of Jurists *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (April 1985) [Siracusa Principles], [IA(3)].

⁴⁸ Siracusa Principles, [IA(8)].

⁴⁹ Siracusa Principles, [IA(12)].

⁵⁰ Siracusa Principles, [IA(10)]. See also *Toonen v Australia*, above n 45 at [8.3].

⁵¹ United Nations Human Rights Committee *General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, above n 44, at [3]-[4].

⁵² Siracusa Principles, [IB](27).

restrictive homebirth policy breached a woman's right to privacy and family life, the ECtHR stated that:⁵³

"The notion of personal autonomy is a fundamental principle underlying the interpretation of the guarantees of Article 8 ... The Court is satisfied that the circumstances of giving birth incontestably form part of one's private life for the purposes of this provision; and the Government did not contest this issue."

As well as the right to personal autonomy⁵⁴ and the right to choose the circumstances in which one gives birth,⁵⁵ art 8 extends to personal relationships, including professional or business relationships.⁵⁶ It covers the relationships in a surrogacy arrangement between intended parents and child in a surrogacy arrangement.⁵⁷

Article 8 ECHR is not applicable in New Zealand and is broader than art 17 ICCPR but it still provides a guide to its likely interpretation on similar issues.

Government interference with surrogacy relationships must be justified. Interference may include any prohibition on the intended parent(s) providing reimbursement, compensation or remuneration to the surrogate. Whether a particular interference (for example, restricting surrogacy arrangements, or aspects of surrogacy arrangements, such as reimbursement of expenses or remuneration of surrogates) can be justified depends upon an assessment of the validity of the reasons that the state may have.

John Tobin argues that:⁵⁸

"... the right to respect to privacy and family life encompasses a right to enter surrogacy arrangements, this right remains subject to a State's capacity (and potential obligation) to restrict this where it is reasonably necessary to (a) protect the rights of persons other than the intending parents and/or (b) protect public morality."

There is a need to establish the relevant "public morality" in the state at the relevant time, in order to evaluate any limitations on privacy for compliance with human rights law.

ECtHR case law which balances public purposes with privacy rights in the surrogacy context is fact-specific in balancing the public interest in enforcing the law with the right to privacy of either the intended parent(s) or the surrogate-born children.⁵⁹ There is no ECtHR jurisprudence about the right to privacy of the surrogate.

⁵³ *Ternovszky v Hungary* ECHR 67545/09, 14 December 2010 at [22].

⁵⁴ *Pretty v United Kingdom*, above n 5.

⁵⁵ *Ternovszky v Hungary*, above n 53.

⁵⁶ *Niemitz v Germany* ECHR 13710/88, 16 December 1992 at [29].

⁵⁷ *Mennesson v France* ECHR 65192/11, 26 June 2014.

⁵⁸ Tobin, above n 10, at 325.

⁵⁹ Compare *Mennesson v France* above n 57 and *Paradiso and Campanelli v Italy Grand Chamber* ECHR 25358/12, 24 January 2017.

Realising the right to privacy for surrogates in New Zealand

In New Zealand, art 17 ICCPR is implemented in a piecemeal approach in a range of statutory and common law contexts.⁶⁰ The right to privacy is not recognised in NZBORA. New Zealand's obligations under international human rights law still play a role in developing the common law,⁶¹ interpreting legislation,⁶² and as a relevant consideration for decision-makers.⁶³

The ICCPR obliges New Zealand to justify any limitations on the surrogate's decisions to enter into a surrogacy arrangement.

New Zealand does not currently limit the ability of a surrogate to act as a surrogate. However, it does interfere with the surrogate's right to privacy by:

- preventing the surrogate from receiving compensation or consideration; and
- making surrogacy contracts unenforceable.

The giving or receiving of valuable consideration for entering into a surrogacy arrangement is criminalised by s 14(3) of the HART Act, which reads:

“Every person commits an offence who gives or receives, or agrees to give or receive, valuable consideration for his or her participation, or for any other person's participation, or for arranging any other person's participation, in a surrogacy arrangement.”

The payment to a fertility clinic or legal advisor of reasonable and necessary expenses incurred in relation to the surrogacy is permitted.⁶⁴

Surrogacy contracts are also unenforceable.⁶⁵ Arguably, the unenforceability of surrogacy contracts makes the surrogate, the intended parents and the child more vulnerable due to the lack of certainty in their positions.

To comply with international law, these limitations on the surrogate's rights must be justifiable. To date, no official justification has been provided.

The most likely justifications that the state could offer are arguments that:

- commercial surrogacy amounts to sale of children in breach of CRC (see **Part Three**);
- it is contrary to public morality to require a woman to relinquish a child after its birth and therefore surrogacy contracts should not be enforceable;
- commercial surrogacy amounts to exploitation of women and is therefore contrary to public morality; or
- all surrogacy amounts to commodification of women and is therefore contrary to public morality.

⁶⁰ See the discussion in Roth, above n 40, at 440-449.

⁶¹ *Hosking v Runting* [2004] NZCA 34.

⁶² *Zaoui v AG (No 2)* [2006] 1 NZLR 289 (SC).

⁶³ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

⁶⁴ HART Act, s 14(4).

⁶⁵ HART Act, s 14(1).

Each of these potential justifications contains disputable premises, about which there is disagreement in bioethical and legal academic literature.⁶⁶

Several of these potential justifications rely on a concept of “public morality” (or similar) which needs greater specificity and objectivity in order to justify the limitation of a human right. In turn this depends upon an assessment of the fundamental values of the community.

A recent survey on perceptions of the New Zealand public showed that most New Zealanders think that domestic surrogacy should be legal, and among them, the majority thought that surrogates should be paid for their time and service.⁶⁷ Further, most respondents thought that surrogacy contracts should be enforceable.⁶⁸ It may therefore be that the current legislative approach in New Zealand is not supported by the fundamental values of the community.

To date, there has been no clear policy argument on this issue made by the New Zealand government that would satisfy the requirements of the ICCPR. The limitation on a surrogate’s right to enter an enforceable or paid surrogacy agreement has not yet been tested in any international court.

Questions about New Zealand’s current approach to the right to privacy

The following questions arise in relation to New Zealand’s current approach to the surrogate’s right to privacy:

- What justifications can the New Zealand government offer for the limitation on the surrogate’s right to enter into an enforceable surrogacy contract?
- What justifications can the New Zealand government offer for the limitation on the surrogate’s right to enter into a paid surrogacy arrangement?
- Do these justifications meet the criteria for legitimate limitation on international human rights?
- Do these justifications constitute unjustified discrimination against surrogates?
- What are the fundamental values of the New Zealand community in relation to surrogacy?

⁶⁶ See literature discussed in Natalie Baird “Commercial Surrogacy and the Sale of Children: A Call to Action for the Committee on the Rights of the Child” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial and Corporate Law Inc, Christchurch, 2019) 115 and Rhonda Powell “Exploitation of Surrogate Mothers in New Zealand” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial and Corporate Law Inc, Christchurch, 2019) 57.

⁶⁷ D Wilson *Part Two: Understanding the Perceptions and Experiences of Surrogates through Empirical Research* (Report to the New Zealand Law Foundation, 2019) at 8.

⁶⁸ D Wilson “The Emerging Picture of the Role Played by Surrogacy Contracts in New Zealand” in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial and Corporate Law Inc, Christchurch, 2019) 153 at 172 and following.

The Surrogate's Employment Rights

Employment rights have been developed in parallel by the international human rights movement and the international labour movement.⁶⁹ There is considerable overlap between rights protected by ICESCR and the various Conventions of the International Labour Organization (ILO).

The two employment rights most relevant to surrogacy are the right to work and the right to just and favourable conditions of employment. The right to work is important in realising other human rights and in allowing people to live in dignity. It also contributes to the survival of the individual and their family, and supports the individual's recognition within the community.⁷⁰

It is not clear whether surrogacy should be treated as a form of 'employment' so as to engage employment rights. The conventional view is that employment rights only apply to paid work. However, it has been argued that the right to work extends to voluntary work,⁷¹ in which case it could apply to surrogacy, whether or not it is paid. Even if this is the case, surrogacy is more akin to a contractor role than an employee role, and so many employment-related rights will not apply.

Whether or not acting as a surrogate engages the right to work, a surrogate may be engaged in other employment and would have recognised rights in relation to that employment.

The right to work

The international legal basis of the right

The right to work is recognised by art 23 UDHR and art 6(1) ICESCR, the latter of which provides:

"The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

What does the right require?

It has been stated that the right to work in art 6(1) ICESCR "...essentially means that everyone, without discrimination, should be able to earn their living at work that they freely choose...".⁷² The right to work covers all forms of employment, and arguably applies to voluntary work too.⁷³

The international jurisprudence about the right to work has focussed on the right to be free from forced or coerced labour, and the right not to lose one's employment unfairly or arbitrarily. The right to be free from coerced or forced labour may be relevant to surrogacy in some international contexts but there is no evidence that women in New Zealand are forced to be surrogates. The right not to lose one's employment unfairly or arbitrarily may be relevant to employed women who act as surrogates in New Zealand.

⁶⁹ Paul Roth "Economic Rights: Workplace Rights and the Right to Social Security" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 611 at 611.

⁷⁰ United Nations Committee on Economic, Social and Cultural Rights *General Comment No 18: The right to work* UN Doc E/C.12/GC.18 (6 February 2006) at [1].

⁷¹ B Saul, D Kinley and J Mowbray *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press, Oxford, 2014) at 281-282.

⁷² Roth, above n 69 at 623.

⁷³ Saul et al, above n 71.

Based on the text of art 6(1), it could be argued that a woman has the right to choose to gain a living by being a surrogate. A parallel could be made with sex-work, which is regulated in New Zealand within an occupational health context.⁷⁴ Of course, few rights are absolute, and recognition of a right to gain a living by being a surrogate would not prevent regulations aimed at protecting the interests of the surrogate, the intended parents and the child.

Most jurisprudence on the right to work focuses on the prohibition on forced or compulsory labour and the arbitrary or unfair deprivation of employment.⁷⁵ The second of these has most relevance to surrogacy.

The ILO Termination of Employment Convention (ILO Convention 158) sets out the international standards in relation to employment protection.⁷⁶ It requires a valid reason for termination, which is connected with the capacity or conduct of the worker, or the operational requirements of the workplace.

ILO Convention 158 states that employment cannot be terminated for discriminatory reasons such as sex, marital status, family responsibilities, pregnancy and absence following maternity leave.⁷⁷ This means that a woman's employment should be protected while she is absent from work due to pregnancy or giving birth.

The right to just and favourable conditions of work

The international legal basis of the right

Labour law focused on working conditions has been developing since the 19th century. The right to just remuneration was recognised in the Treaty of Versailles 1919, which established the ILO, the revised ILO Constitution of 1946,⁷⁸ and the UDHR.⁷⁹

Article 7 ICESCR protects just and favourable conditions of work, which includes remuneration and safe and healthy working conditions. Remuneration must provide for:⁸⁰

“(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; ...”

The ILO has also adopted a number of Conventions and Recommendations on minimum wages.⁸¹

⁷⁴ Prostitution Reform Act 2003. See G Abel “A decade of decriminalization: Sex work ‘down under’ but not underground” (2014) 14(5) Criminology & Criminal Justice 580.

⁷⁵ Roth, above n 69, at 623.

⁷⁶ International Labour Organization Termination of Employment Convention (No 158) (ILO Convention 158) 1412 UNTS 159 (opened for signature 22 June 1982, entered into force 23 November 1985), art 4. New Zealand has not ratified ILO Convention 158 but its rules are largely compliant with it: Roth, above n 69, at 632-633.

⁷⁷ ILO Convention 158, art 5.

⁷⁸ International Labour Organization Constitution, preamble.

⁷⁹ UDHR, art 23(3).

⁸⁰ ICESCR, art 7(a)(i) and (ii).

⁸¹ Listed in Roth, above n 69, at 635-636.

What does the right require?

The CESCR has stated that the minimum wage should be applied to everybody regardless of their occupation. The CESCR has mostly taken a basic needs approach as opposed to distributive fairness approach to determining whether remuneration is fair.⁸²

Of particular relevance is the right to equal remuneration for work of equal value, recognised in art 7(a)(i) ICESCR.

Employment rights in the surrogacy context

Articles 6 and 7 ICESCR mean that:

- A surrogate's employment (if she has any) should be protected during her pregnancy and birth;
- A surrogate should not be discriminated against in her employment in relation to her pregnancy; and
- If surrogacy is treated as 'employment' itself then:
 - a woman has the right to choose to be employed as a surrogate;
 - a surrogate should be fairly paid for her work; and
 - a surrogate is entitled to safe and healthy working conditions.

The right to safe and healthy working conditions has particular relevance to the international commercial surrogacy context where some surrogates are kept in highly controlled residential facilities run by surrogacy agencies during the pregnancy and following the birth.⁸³

Discrimination against surrogates in employment

Just like any other pregnant woman, if it can be shown that surrogates are treated unfavourably in their workplace because of their gender or their pregnancy, there may be an employment discrimination issue.

Employment discrimination is prohibited in arts 2(2) and 3 ICESCR. Protection against employment discrimination is also included in CERD,⁸⁴ CEDAW⁸⁵ and CRPD.⁸⁶ Article 11(f) CEDAW provides:⁸⁷

"States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: ... (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction."

The obligation to prohibit unfair discrimination is of immediate effect.⁸⁸

⁸² Saul et al, above n 71, at 406-407.

⁸³ Trowse and Cooper, above n 25, at 401-405; and Tanderup, above n 25, at 494.

⁸⁴ CERD, art 5(e)(i).

⁸⁵ CEDAW, art 11(1)(a).

⁸⁶ CRPD, art 27.

⁸⁷ CEDAW, art 11(f).

⁸⁸ United Nations Committee on Economic, Social and Cultural Rights *General Comment No. 18: The Right to Work (Art 6 of the Covenant)*, above n 70, at [19].

Realising employment rights for surrogates in New Zealand

A surrogate's employment must be protected while she is on leave before and after the birth. The Employment Relations Act 2000 prohibits unjustified dismissal,⁸⁹ unjustifiable disadvantage,⁹⁰ and unlawful discrimination,⁹¹ and provides a range of potential remedies including reinstatement, reimbursement of lost wages, compensation for loss of dignity, and costs.

New Zealand law also provides for female employees who are pregnant to take ten days of unpaid special leave for reasons connected with pregnancy,⁹² up to twelve months of paid carer's leave and extended leave,⁹³ and in some circumstances, volunteer's leave.⁹⁴ Paid parental leave is available if the baby is stillborn or dies, and in many situations, up to five days sick leave⁹⁵ and up to three days bereavement leave are also available.⁹⁶

However, surrogates are otherwise in a vulnerable position in relation to employment leave. Recent amendments to the Parental Leave and Employment Protection Act 1987 provide greater flexibility for people who are not the birth parents of a child to take leave to care for it, and therefore benefit the intended parents of a surrogate-born child.⁹⁷

Beyond the ten days of special leave allowed for a pregnant woman, there is no specific provision for employment leave for postnatal recovery, which is normally thought to take around six weeks. This is because leave is connected to caring for the child, rather than for recovering from the birth. In practice, this may be resolved by the surrogate and the intended parents agreeing to share the carer's leave entitlements.

It would be preferable for the law to provide directly for situations when the woman who gives birth does not go on to care for the child, and clarify her entitlements to a period of employment leave, rather than relying on the ability of the parties to negotiate. The reliance on informal arrangements is particularly difficult given that surrogacy contracts are not enforceable in New Zealand,⁹⁸ and so a surrogate would have little means of redress if the intended parents reneged from the agreed leave arrangements.

If acting as a surrogate is treated as 'employment', then a surrogate has a right to fair remuneration.⁹⁹ Surrogacy fits within the type of gender-segregated profession that is typically undervalued.

The right to safe working conditions is relevant to international surrogacy but is less likely to be an issue in New Zealand where there are no industrialised surrogacy clinics.

⁸⁹ Section 103(1)(a).

⁹⁰ Section 103(1)(b).

⁹¹ Section 103(1)(c). See also Human Rights Act 1993, s 22(1).

⁹² Parental Leave and Employment Protection Act 1987, s 15.

⁹³ Parental Leave and Employment Protection Act 1987, Parts 1 and 3.

⁹⁴ For service in the Armed Forces see Volunteers Employment Protection Act 1973.

⁹⁵ Holidays Act 2003, s 65.

⁹⁶ Holidays Act 2003, ss 69-70.

⁹⁷ A Masselot and I Schelp "Parental Leave and Surrogacy: Caring is Everything" in Annick Masselot and Rhonda Powell (eds) *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial and Corporate Law Inc, Christchurch, 2019) 137-152 and R Russell and A Masselot "Why do we care? The shifting concept of care in New Zealand and in the United Kingdom" (2020) 36(2) IJCLIR 81.

⁹⁸ HART Act, s 14.

⁹⁹ Minimum Wage Act 1983. The current minimum wage for employees aged over 16 is \$18.90 per hour: Minimum Wage Order 2020. This is reviewed annually.

Questions about New Zealand's current approach to the surrogate's employment rights

The following questions arise in relation to New Zealand's current approach to the surrogate's employment rights:

- How can New Zealand employment law protect the needs of surrogates for postnatal recovery?
- How can New Zealand employment law prevent discrimination against surrogates?
- If it were accepted that commercial surrogacy could take place in New Zealand, how should the work be valued?
- If it were accepted that commercial surrogacy could take place in New Zealand, how would the issues around pay-equity that arise in other gender-segregated industries be avoided?

PART THREE: RIGHTS OF THE CHILD

Introduction

The CRC contains a number of rights relevant to the child born of a surrogacy arrangement. Foremost amongst these is the obligation to consider the best interests of the child (art 3 CRC). Other important rights for the child of a surrogacy arrangement considered in this part are:

- the right to nationality (art 7);
- the right to identity (art 8); and
- the right not to be sold (art 35).

New Zealand ratified the CRC in 1993, and is also a party to ICESCR (ratified in 1978) and the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (CRC-OPSC)¹⁰⁰ (ratified in 2011). New Zealand has not yet ratified the Optional Protocol on a Communications Procedure (CRC-OPCP),¹⁰¹ which enables individual complaints to be taken to the Committee on the Rights of the Child, although is likely to do so.

Other rights relevant to the rights of the child in the surrogacy context, but not considered in detail in this Part include:

- the right to family reunification (art 10); and
- the right to be free from discrimination (art 2), especially in relation to discrimination for “reasons of parentage or other conditions” (art 10(3) ICESCR).

The Best Interests of the Child

The key overarching right in relation to the rights of the child in the surrogacy context is the best interests of the child.

The international legal basis of the right

The notion that children are entitled to special care and assistance was first recognised in art 25(2) UDHR which provided, in the context of the right to an adequate standard of living that:

“(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

Subsequently, the Declaration of the Rights of the Child 1959 provided that:¹⁰²

“the child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.”

¹⁰⁰ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2171 UNTS 227 (opened for signature 25 May 2000, entered into force 18 January 2002), preamble and art 8.

¹⁰¹ *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* GA Res 66/138, A/RES/66/138 (opened for signature 28 February 2012, entered into force 14 April 2014), preamble and arts 2 and 3.

¹⁰² *Declaration of the Rights of the Child* GA Res 1386 (1959) at [2].

Article 3 CRC provides:

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration.**

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, **taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her**, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.” [emphasis added]

As well as art 3, individual articles of the CRC also recognise the best interests of the child including art 9 (separation from parents), art 10 (family reunification), art 18 (parental responsibilities), and art 21 (adoption). Reference to the child’s best interests is also found in the CRC-OPSC, and the CRC-OPCP. Aside from recognition of the best interests of the child in the CRC, the principle is also recognised in CEDAW,¹⁰³ and the Hague Convention on Protection of Children and Cooperation in Respect to Intercountry Adoption 1993.¹⁰⁴

The best interests of the child principle is just one of four key guiding principles that underpins the other rights in CRC. The other three principles are respect for the views of the child (art 12 CRC), the right to life, survival and development (art 6 CRC) and non-discrimination (art 2 CRC).¹⁰⁵

What does the best interests of the child require?

Article 3(1) CRC requires that: “[s]imply put, all adults, particularly law makers and policy bodies, should do what is best for children; but it is apparent that there is a lack of agreement, internationally and nationally, about what constitutes children’s interests, let alone their ‘best’ interests.”¹⁰⁶ The Committee on the Rights of the Child has said that the best interests principle is “a dynamic concept that requires an assessment appropriate to the specific context.”¹⁰⁷ It is a complex concept and its content must be determined on a case-by-case basis.¹⁰⁸ It requires “the development of a rights-based approach, engaging all actors, to secure the holistic, physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.”¹⁰⁹

¹⁰³ CEDAW, arts 5(b) and 16(1)(d).

¹⁰⁴ Hague Convention on Protection of Children and Cooperation in Respect to Intercountry Adoption 1870 UNTS 167 (opened for signature 29 May 1993, entered into force 1 May 1995), art 1(a).

¹⁰⁵ Committee on the Rights of the Child *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003).

¹⁰⁶ Adam McBeth, Justine Nolan and Simon Rice *The International Law of Human Rights* (Oxford University Press, Melbourne, 2011) at 432.

¹⁰⁷ Committee on the Rights of the Child *General Comment No 14: on the right of the child to have his or her best interests taken as a primary consideration*, above n 9, at [1].

¹⁰⁸ At [32].

¹⁰⁹ At [5].

The Committee on the Rights of the Child asserts that the child's best interests is a threefold concept comprising:¹¹⁰

- A substantive right: This is the right of the child to have their best interests assessed and taken as a primary consideration whenever a decision is to be made concerning a child.
- A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.
- A rule of procedure: Whenever a decision is to be made that will affect a specific child or group of children, then the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.

In terms of the nature and scope of obligations imposed on states under art 3, the Committee on the Rights of the Child is of the view that art 3 establishes a framework with three different types of obligations for state parties:¹¹¹

- The obligation to ensure that the child's best interests are appropriately integrated and consistently applied in actions by public institutions including administrative and judicial proceedings which impact on children.
- The obligation to ensure that all judicial and administrative decisions as well as policies and legislation demonstrate that the child's best interests have been a primary consideration.
- The obligation to ensure that the interests of the child have been assessed and taken into account as a primary consideration in actions taken by the private sector.

Article 3 implicitly recognises that while children are in possession of their own rights, inevitably adults will be making decisions on a child's behalf. The "best interests" principle therefore gives decision makers the authority to substitute their own decisions for either the child's or the parents', providing it is based on the best interests of the child.¹¹²

There is an ongoing debate at the international level and within individual domestic jurisdictions as to the paramountcy, primacy or otherwise of the best interests principle. Importantly, art 3(1) provides for the best interests of the child to be "among the first considerations rather than requiring them to be the first considered or favoured."¹¹³ The Committee on the Rights of the Child puts it this way:¹¹⁴

"The expression 'primary consideration' means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness.

Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned."

¹¹⁰ At [6].

¹¹¹ At [14].

¹¹² McBeth et al, above n 106, at 432 citing Geraldine van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff, The Hague, 1998) at 46.

¹¹³ McBeth et al, above n 106, at 432.

¹¹⁴ Committee on the Rights of the Child *General Comment No 14: on the right of the child to have his or her best interests taken as a primary consideration*, above n 9, at [37] and [40].

A number of commentators nevertheless argue that the best interests of the child should in fact be “the” primary consideration rather than “a” primary consideration.¹¹⁵ Many court decisions also give primacy to the best interests of the child.¹¹⁶ However, the language of art 3(1) and the drafting history of CRC is clear that the best interests of the child was intended to be “a” primary consideration.

The best interests of the child in the surrogacy context

In the surrogacy context, the best interests of the child has been invoked in a number of different and complex scenarios. Mostly these have been in situations where no other CRC right directly addresses the issue. In essence, the best interests principle is used as either a substantive right or a fundamental interpretive principle (the first two elements of the Committee on the Rights of the Child’s conception of the right – noted above).

First, in light of cases where there is risk of exploitation, abuse or neglect of the child born of a surrogacy arrangement by the intending parent(s),¹¹⁷ it has been argued that the best interests of the child may require the parenting ability of the intending parent(s) to be subject to a suitability assessment.¹¹⁸ Such an assessment would be contentious especially since it is not required in the context of orthodox family formation, and would arguably interfere with the intending parent(s)’ right to privacy and family life (see discussion in the Introduction about resolving conflicts between rights).

Second, in states where domestic commercial surrogacy is prohibited, but intending parent(s) enter into an international commercial surrogacy arrangement, the best interests principle has been used to outweigh public policy concerns regarding payments in surrogacy arrangements. Essentially, domestic courts have used the best interests principle to find that even though there is a public policy rationale against commercial surrogacy, given that it has occurred, the best approach is to approve the arrangement (whether by grant of a visa, citizenship or an adoption order) as this is in the overall best interests of the child. For example, in the English case of *Re L (a child)*, the judgment explicitly considered the welfare of the child to be the paramount consideration, and it was found to outweigh public policy considerations regarding payments in surrogacy arrangements.¹¹⁹

A potential risk in the surrogacy context is where either the surrogate mother or the intending parent(s) change their mind about giving up or receiving the resulting child. A surrogacy arrangement which leads to prolonged custody battles and movement of a child between families and households is clearly not in the best interests of the child.¹²⁰ If a custody dispute does eventuate, then the best interests principle can and should be used to resolve it as expeditiously as possible.¹²¹

¹¹⁵ For example, Bantekas and Oette argue that the children’s “best interests” principle is paramount in any determination of matters pertinent to children. See Ilias Bantekas and Lutz Oette *International Human Rights Law and Practice* (CUP, Cambridge, 2016) at 530.

¹¹⁶ For example, in *Mennesson v France*, above n 57, the Court applied the best interests of the child as the paramount consideration.

¹¹⁷ For example, see *M.C. v C.M.* 138 S Ct 239 (2017); *Farnell & Anor v Chanbua* [2016] FCWA 17; *Huddleston v Infertility Center of America Inc* (1997) 700 A.2d 453.

¹¹⁸ For discussion, see Tobin, above n 10, at 333-334.

¹¹⁹ *Re L (A child)* [2010] EWHC 3146 (Fam). For further discussion, see Claire Achmad “Contextualising a 21st century challenge Part Two: Public international law human rights issues: Why are the rights and interests of women and children at stake in international commercial surrogacy arrangements?” [2012] NZFLJ 206 at 207.

¹²⁰ Jessica M Caamano “International Commercial, Gestational Surrogacy Through the Eyes of Children Born to Surrogates in Thailand: A Cry for Legal Attention” (2016) 96 BUL Rev 571 at 585.

¹²¹ For discussion of the *Baby Manji* case in this context see Achmad, above n 119, at 207-208.

The best interests principle can therefore be used to help decision makers find solutions to practical and legal dilemmas which are consistent (or more consistent) with the best interests of the child.

The best interests of the child in the surrogacy context in New Zealand

In New Zealand, the principle of the best interests of the child is reflected in various ways in the legislative framework pertaining to children. For example, s 4(1) of the Care of Children Act 2004 provides that the welfare and best interests of the child “must be the first and paramount consideration” in decisions about the guardianship and day-to-day care of a child. Similarly, s 6 of the Oranga Tamariki Act 1989 / Children’s and Young People’s Well-being Act 1989 provides that the welfare and interests of the child or young person “shall be the first and paramount consideration”. This formulation of the best interests principle in these pieces of legislation clearly asserts that in these contexts at least, the best interests of the child is to be “the” primary consideration.

The best interests of the child is also referred to in various other pieces of legislation including the Children’s Commissioner Act 2003, the Adoption (Intercountry) Act 1997, the Family Courts Act 1980, and the Family Violence Act 2018.

The best interests principle is not directly referenced in some of the key pieces of legislation which currently regulate surrogacy arrangements in New Zealand:

- Section 4(a) of the HART Act does provide that one of the guiding principles for people exercising powers or functions under the Act is “the health and well-being of children” born as a result of the performance of an assisted reproductive procedure, but does not refer explicitly to the best interests of the child.
- The Adoption Act 1955 contains no reference to the best interests of the child.
- The Status of Children Act 1969 contains no reference to the best interests of the child.

The ACART Guidelines on Surrogacy Involving Assisted Reproductive Procedures (ACART Guidelines) refer to the interests of children in a number of places as follows:¹²²

- The Preamble notes the HART Act requirements “for the protection and promotion of the health, safety, dignity, and rights of all individuals, but particularly those of women and children” and the “health and wellbeing of children” (s 4(a) and (b)).
- Guideline 1 reproduces the principles set out in s 4 of the HART Act.
- Guideline 2(b)(iii) requires that ECART must be satisfied that the risks associated with a surrogacy for any resulting child are justified including the risk that the intending parent(s) may change their mind about parenting a resulting child, and the risks to the health and wellbeing of a resulting child, including becoming the subject of a dispute if the relationship between the surrogate and intending parents breaks down.
- Guideline 2(c)(ii) provides that ECART also has to take into account whether the relationship between the intending parent(s) and the intending surrogate safeguards the wellbeing of all parties especially any resulting child.
- Guideline 2(c)(iv) requires ECART to consider whether counselling has provided for the inclusion of any (existing) children of the parties and so considers the interests of children who will be siblings of the new child.

¹²² ACART Guidelines, above n 33.

- Guideline 2(c)(vi) provides that ECART is also to take into account whether the residency of the parties safeguards the wellbeing of all parties and especially any resulting child.

New Zealand's *Information Fact Sheet: International Surrogacy* also contains a number of references to the child's interests as follows:¹²³

- The "vulnerability of children due to a number of their rights not being met" is noted as one of the social risks which intending parent(s) should consider before entering an international commercial surrogacy arrangement.
- Reference to "the outcome that is in the best interests of the child" and steps taken by the intending parent(s) to preserve the child's identity is listed in the appendix as one of the matters Ministers may consider in deciding whether to grant a visa or citizenship to a baby born as a result of a surrogacy arrangement.

From these existing references then, it seems that the "best interests" principle is not reflected as comprehensively as it could be in relevant statutes and other guidance in the surrogacy context. This concern was noted by the Committee on the Rights of the Child, albeit as a comment at a general level, when it recommended in 2016 that New Zealand:¹²⁴

"strengthen its efforts to ensure that this right [art 3] is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions, in particular with regard to family law, social security legislation, children in care (particularly Maori children), sentencing of parents and in the refugee determination process. The State party is encouraged to develop procedures and criteria to provide guidance to all relevant professionals for determining the best interests of the child in every area and for giving it due weight as a primary consideration."

Questions about New Zealand's current approach to the best interests of the child

The following questions arise in relation to New Zealand's current approach to the best interests of the child:

- How should the best interests of the child be promoted in any surrogacy law reform?
- Whether the guiding principles applying to decision makers under the HART Act (currently reflected in s 4) should explicitly include the best interests of the child?
- Whether the Adoption Act 1955 and the Status of Children Act 1969 should include reference to the best interests of the child?
- Whether Oranga Tamariki's current screening procedures for intended parent(s) as adoptive applicants are adequate?

¹²³ New Zealand Government *Information Fact Sheet: International Surrogacy* (March 2019) at 1 and 5.

¹²⁴ Committee on the Rights of the Child *Concluding Observations on the fifth periodic report of New Zealand* UN Doc CRC/C/NZL/CO/5 (21 October 2016) at [16].

The Child's Right to Nationality

International legal basis of the right

The rights to nationality and the prevention of statelessness find their origins in art 15 UDHR which provides that:

- “(1) Everyone has the **right to a nationality**.
- (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”

In relation to children, this right is further expanded upon in art 24 ICCPR which provides:

- “1. Every **child** shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
- 2. Every child shall be **registered** immediately after birth and shall have a name.
- 3. Every child has the **right to acquire a nationality**.” [emphasis added]

Since 1990, the child's right to nationality and protection from statelessness has been reflected in art 7 CRC which provides:

- “1. The child shall be **registered** immediately after birth and shall have the right from birth to a name, the right to acquire a **nationality** and as far as possible, the right to know and be cared for by his or her parents.
- 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be **stateless**.” [emphasis added]

Article 7 is a multi-faceted right with a number of discrete elements including birth registration, the right to know and be cared for by his/her parents, and the right to nationality. In the surrogacy context, a key concern is the right to nationality and protection from statelessness.

It is important to note that the right to nationality is closely linked to the right to recognition as a person before the law. This is found in art 16 ICCPR which provides that “Everyone shall have the right to recognition everywhere as a person before the law.”

In addition to these human rights documents, there are two international treaties specifically concerned with the phenomenon of statelessness – the 1954 Convention relating to the Status of Stateless Persons¹²⁵ and the 1961 Convention on the Reduction of Statelessness.¹²⁶ The 1954 Convention defines a stateless person as someone “who is not considered as a national by any State under operation of its law”¹²⁷ and provides for certain minimum standards of treatment of stateless persons. It includes obligations relating to the provision of identity papers and travel documents, and the facilitation of naturalisation for stateless persons.¹²⁸ The 1961 Convention is aimed at reduction of statelessness and contains rules for the conferral and non-withdrawal of citizenship to prevent

¹²⁵ Convention relating to the Status of Stateless Persons (CSSP) 360 UNTS 117 (opened for signature 1954, entered into force 6 June 1960).

¹²⁶ Convention on the Reduction of Statelessness (CRS) 989 UNTS 175 (opened for signature 30 August 1961, entered into force 13 December 1975).

¹²⁷ CSSP, art 1(1).

¹²⁸ CSSP, arts 27, 28 and 32.

cases of statelessness from arising. The UN High Commissioner for Refugees notes that by setting out rules to limit the occurrence of statelessness, the Convention gives effect to art 15 UDHR.¹²⁹ The Convention specifically addresses the prevention of statelessness at birth by requiring states to grant citizenship to children born on their territory, or born to their nationals abroad, who would otherwise be stateless.¹³⁰

New Zealand has ratified the ICCPR and the CRC. In terms of statelessness, New Zealand acceded to the Convention on the Reduction of Statelessness in 2006, but is not yet a party to the 1954 Convention relating to the Status of Stateless Persons. The UN High Commissioner for Refugees has recommended that New Zealand should accede to the 1954 Convention and establish a formal statelessness determination procedure in legislation. In 2019, as part of its universal periodic review before the UN Human Rights Council, New Zealand agreed to consider acceding to the 1954 Convention.¹³¹ The Ministry of Business, Innovation and Employment (MBIE) will lead work on considering whether to accede.

What does the right to nationality require?

The HRC, commenting on art 24(3) ICCPR, has said that the purpose of the right to nationality is “to prevent a child from being afforded less protection by society and the State because he is stateless.”¹³² While there is not necessarily an obligation on states to give their nationality to every child born in their territory, “States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born.”¹³³

Historically, determining what nationality a child would acquire was based on the Latin maxims of *jus soli* and *jus sanguinis*. The *jus soli* principle provides that a child may automatically attain the nationality of the state in which they were born. The *jus sanguinis* principle provides that a child attains nationality via descent from his/her parents. These two principles of citizenship by birth and citizenship by descent are still reflected in the laws of many states today.

The right to nationality in the surrogacy context

The right to nationality arises most sharply in the context of international (commercial) surrogacy arrangements. A potential scenario is for neither the birth state of the surrogate mother nor the home state of the intending parent(s) to grant the child nationality or citizenship at birth. In this situation, the child can often be left in “legal limbo” or technically stateless. A challenge for the home state of the intending parent(s) in this context, and a reason for delay in granting parenthood and thus nationality, is the state’s interest in guarding against potential sale and trafficking of children.

The consequences of delay in granting or failing to grant nationality can vary. In a best case scenario, the home state of the intending parent(s) may eventually recognise parenthood (such as via an adoption order), and grant nationality. For example, the ECtHR has held that overly restrictive

¹²⁹ CRS, at 3 (Introductory note).

¹³⁰ CRS, arts 1 and 4.

¹³¹ A United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: New Zealand* UN Doc A/HRC/41/4 (1 April 2019), at [122.2]; United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: New Zealand (Addendum)* UN Doc A/HRC/41/4/Add.1 (17 June 2019) at [5]-[6].

¹³² United Nations Human Rights Committee *General Comment No 17: Article 24 (Rights of the Child)* XXXV (7 April 1989) at [8].

¹³³ At [8].

surrogacy laws that offend the parent-child relationship and fail to grant nationality to the child undermine the child's identity within the society of its intending parent(s).¹³⁴ In this type of scenario then, the child is only temporarily stateless, with nationality and 'limping' legal parentage eventually recognised.

An alternative scenario is where the intending parent(s) spend many months or even years in the state of the surrogate mother attempting to secure travel documents to take their child back to the state of the intending parent(s).¹³⁵ For example, in *Balaz v Anand Municipality*, German intending parents commissioned an Indian surrogate mother who gave birth to twin boys.¹³⁶ The boys were however left stateless for two years as neither India nor Germany would grant nationality. Eventually the case was resolved by requiring the intending parent(s) to adopt the twins through the intercountry adoption process. In a worst case scenario, where there is a legal stalemate, some intending parent(s) have resorted to smuggling their surrogate baby into their home state.¹³⁷

Where children born of surrogacy are rendered temporarily stateless and without a nationality, this may also suggest unlawful discrimination. Article 2(1) CRC provides that child's rights are to be "respect[ed] and ensure[d] ... without discrimination of any kind ... [including] birth or other status."¹³⁸ Art 10(3) ICESCR also provides that "[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions." It has been argued that denying citizenship to children because of the circumstances of their birth or because of the actions (or infertility) of their parents, circumstances over which they had no control, may amount to unlawful discrimination.¹³⁹

Realising the right to nationality in the surrogacy context in New Zealand

The legislative framework for recognising the right to nationality in New Zealand includes the Citizenship Act 1977 and the Births, Deaths, Marriages and Relationships Registration Act 1995. Since 2006, a child born in New Zealand is a New Zealand citizen if at least one parent is a New Zealand citizen, or is entitled to remain in New Zealand indefinitely (eg is a permanent resident).¹⁴⁰ A child born in New Zealand who is not a New Zealand citizen is deemed to hold the most favourable immigration status of either parent. A child born overseas with New Zealand citizen parent(s) (where the parent(s) were not themselves born overseas) is entitled to New Zealand citizenship.¹⁴¹ Current protections from statelessness include s 9(1)(d) of the Citizenship Act which allows the Minister of Internal Affairs to grant citizenship to someone who would otherwise be stateless.¹⁴²

For surrogacy arrangements taking place within New Zealand, the current framework adequately protects the right to nationality. For example, under the 1977 Act, the surrogate mother is treated as the parent, and so if she is a New Zealand citizen or permanent resident, then the child will automatically be a New Zealand citizen.

¹³⁴ *Mennesson v France*, above n 57, and *Labassee v France* ECHR 65941/11, 26 June 2014.

¹³⁵ Achmad, above n 119, at 207.

¹³⁶ *Balaz v Anand Municipality* [2010] AIR Guj 21 (HC).

¹³⁷ Achmad, above n 119, at 213.

¹³⁸ CRC, art 2(1).

¹³⁹ Barbara Stark "Transnational Surrogacy and International Human Rights Law" (2012) 18(2) ILSA J Int'l L 369 at 386.

¹⁴⁰ Citizenship Act 1977, s 6.

¹⁴¹ Citizenship Act 1977, s 7.

¹⁴² For other protections against statelessness, see Citizenship Act 1977, ss 6(3), 7(1), 17(3).

The situation is more complicated for international (commercial) surrogacy arrangements. In terms of current practice, where a child is born of an international commercial surrogacy arrangement with intending parent(s) who are New Zealand citizens or permanent residents, the child will not automatically be granted New Zealand citizenship.¹⁴³ This is because New Zealand law recognises the surrogate mother and her partner (if she has one) as the legal parents. However, if/when the arrangement is formalised via an adoption in the New Zealand courts, then provided the parents are New Zealand citizens or permanent residents, the child will become a New Zealand citizen. As indicated in the Government Fact Sheet on international surrogacy, the pathway to acquire New Zealand citizenship for children born as a result of a surrogacy arrangement which has been commissioned by New Zealand citizens or permanent residents, is essentially through an adoption order in the New Zealand Family Court.¹⁴⁴ Provided that the application and adoption order occur in a timely manner, then any child in this situation will 'only' be stateless for a short period of time.

The main issue in New Zealand is therefore around the length of time it takes for the child born of an international commercial surrogacy arrangement to acquire New Zealand citizenship and nationality, especially if they do not already have an alternative nationality from the surrogate mother.

Questions about New Zealand's current approach to the right to nationality

The following questions arise in relation to New Zealand's current approach to the child's right to nationality:

- Should New Zealand create a unique visa category for children born of an international surrogacy arrangement with New Zealand resident intending parent(s) who seek to bring the child into New Zealand after birth overseas?
- Should New Zealand amend the Citizenship Act 1977 to explicitly recognise children born of an international surrogacy arrangement with New Zealand commissioning parent(s) as automatically entitled to New Zealand citizenship? Should there be a genetic link to one or both of the commissioning parent(s)?
- If a unique visa category and/or unique citizenship recognition is created for children born of an international surrogacy arrangement? What sort of requirements/checks are required to guard against sale or trafficking in children?
- Should New Zealand ratify the 1954 Convention relating to the Status of Stateless Persons to strengthen its protection for stateless persons (including children born stateless as a result of an international commercial surrogacy arrangement)?
- Should New Zealand strengthen its legislative framework for protecting stateless persons (including children born stateless as a result of an international commercial surrogacy arrangement) by establishing a specific statelessness determination procedure?

¹⁴³ See R Powell "International Surrogacy and Parenthood in New Zealand: Crossing Geographical, Legal and Biological Borders" (2017) 29(2) CFLQ 149.

¹⁴⁴ New Zealand Government, above n 123, at 2.

The Child's Right to Identity

The international legal basis of the right

At the international level, the legal basis for the child's right to identity is found in art 8 CRC. Article 8 provides:

"1. States Parties undertake **to respect the right of the child to preserve his or her identity**, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties **shall provide appropriate assistance and protection**, with a view to re-establishing speedily his or her identity." [emphasis added]

A child's right to identity is linked to other rights including the right to have and develop a personality found in art 22 UDHR:

"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the **free development of his personality**." [emphasis added]

It is also closely linked to the right to nationality in art 7.

What does the child's right to identity require?

Michael Freeman describes identity as "... what we know and what we feel is an organising framework for holding together our past and our present and it provides some anticipated shape to future life. It is an inner personal landscape."¹⁴⁵ There are few rights more basic than the right to identity. Knowing one's identity is a fundamental part of the human experience. To know one's "inner personal landscape" is important; not knowing this information can leave a person feeling as if they are trapped in an identity vacuum.¹⁴⁶

Identity is, however, a contested notion. Blauwhoff and Frohn note that the multi-dimensional and complex nature of identity shows why no legal definition has been attempted.¹⁴⁷ Nevertheless, various scholars have attempted to identify the core elements of identity. Giroux and De Lorenzi separate the understanding of identity into two parts: static and dynamic. The static aspects of identity concern attributes that make one visible to the outside world, for example, physical features, sex, name, genetics, and nationality.¹⁴⁸ Dynamic aspects of identity, which can change over time, include morals and religious and cultural characteristics.¹⁴⁹ Article 8 CRC expressly protects nationality, name and

¹⁴⁵ Michael DA Freeman *Children's Rights: A Comparative Perspective* (Taylor & Francis Ltd, Brookfield, 1996) at 290.

¹⁴⁶ Achmad, above n 119, at 209.

¹⁴⁷ Richard Blauwhoff and Lisette Frohn "International Commercial Surrogacy Arrangements" in Christopher Paulussen and others (eds) *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (TMC Asser Press, The Hague, 2016) 211 at 231.

¹⁴⁸ M Giroux and M De Lorenzi "'Putting the Child First': A Necessary Step in the Recognition of the Right to Identity" (2011) 27 Can J Fam L 53 at 60.

¹⁴⁹ At 60.

family relations – core aspects of static identity. Article 8 also illustrates the state’s duty to protect this right, both passively and actively.¹⁵⁰

Achmad identifies three dimensions of the right to identity:¹⁵¹

- the importance of identity to knowing one’s personal narrative;
- the importance of identity to knowing one’s cultural and ethnic background; and
- the importance of identity to knowing one’s genetic origins – the medical and health rationale.

No matter the precise formulation of the right to identity, at the heart of realisation of the right is the availability of information. Realisation of the right to identity therefore requires that identity information is accessible and available,¹⁵² hence the importance of birth registers recording information about parentage.

The child’s right to identity in the surrogacy context

In the surrogacy context, issues of hidden parentage abound. The use of a surrogate mother or gamete donor may be concealed from a surrogate born child for various reasons. However, children who do not know their genetic origins or gestational mother have been found to live in a state of genetic or genealogical “bewilderment”¹⁵³ or “genetic alienation”.¹⁵⁴ Surrogate children need to know their genetic and cultural backgrounds in order that they may patch their identity together.¹⁵⁵ In terms of adverse impacts if surrogate-born children do not have access to information about their identity or genetic origins, there are risks that a child remains unaware of any hereditary medical conditions and diseases, or any unintentional consanguineous relationships.¹⁵⁶

There is related research on the adverse impacts of donor anonymity (also a common part of the surrogacy context) on donor-born children. Some mental health professionals are of the view that keeping donor information secret could be psychologically and socially harmful to inter-family relationships; they also claim it would be ethically unacceptable.¹⁵⁷ The Royal Commission on Assisted Human Reproduction in Canada has noted that it could be against the child’s best interests to keep the circumstances of conception a secret.¹⁵⁸ Of note here is that many donor-conceived children are only told about the truth of their conception at time of family crisis.¹⁵⁹ Some international research suggests that a significant proportion of parents of donor-conceived children choose to conceal this information from their children, and the data in New Zealand shows similar results.¹⁶⁰ A University of Auckland study found that only a quarter of parents had told their children about their donor

¹⁵⁰ J Doek "Article 8: The Right to Preservation of Identity" *A Commentary of the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, 2006) at 8.

¹⁵¹ Achmad, above n 119, at 209-210.

¹⁵² Blauwhoff and Frohn, above n 147, at 231.

¹⁵³ Achmad, above n 119, at 209 and Clara Watson “Womb Rentals and Baby-Selling: Does Surrogacy Undermine the Human Dignity and Rights of the Surrogate Mother and Child?” (2016) 22(3) *The New Bioethics* 212 at 224.

¹⁵⁴ Eric Blyth “To Be or Not to Be? A Critical Appraisal of the Welfare of Children Conceived through New Reproductive Technologies” (2008) 16 *Intl J Child Rts* 505 at 513.

¹⁵⁵ Achmad, above n 119, at 210.

¹⁵⁶ Paula Gerber and Katie O’Byrne “Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy” in Paula Gerber and Katie O’Byrne (eds) *Surrogacy, Law and Human Rights* (Routledge, London, 2016) 81 at 94.

¹⁵⁷ Rachel Cook, Shelley Day Sclater and Felicity Kaganas *Surrogate Motherhood: International Perspectives* (Hart Publishing, Oxford, 2003) at 171; Gerber and O’Byrne, above 156, at 94; Achmad, above n 119, at 209; and Watson, above n 153, at 224.

¹⁵⁸ Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at 62.

¹⁵⁹ Law Commission, above n 158, at 61; Cook et al, above n 157, at 171.

¹⁶⁰ Law Commission, above n 158, at 62-63.

conception.¹⁶¹ In the surrogacy context, one longitudinal study found that surrogate-born children do not experience psychological issues.¹⁶²

There are barriers to the realisation of a child's right to identity in other non-surrogacy contexts too. For example, in a natural birth situation, a mother may choose not to register the name of the child's father. Infidelity is another context in which a child may never have full information as to his/her genetic origins. It is argued by some commentators that these examples should not undermine arguments in favour of the entitlements of surrogate-born children,¹⁶³ but there may be situations in which it seems to be (more) acceptable for secrecy to trump the child's interests in knowing part of their genetic origins.¹⁶⁴

Recognising the child's right to identity, and in particular the need for a child to have information about their genetic origins in case of future health issues, many countries now provide for birth registers which record the use of surrogate mothers and/or gamete donors. The information on such registers is typically made available to a child once they reach a certain age. In addition to this formal measure, in light of growing awareness of the importance of a child knowing their genetic origins, anecdotal reports suggest that individual parents are choosing to be open with their surrogate born children about their origins. However, some countries do not currently maintain birth registers, and even where they do, there may be practical challenges for a child accessing this information. In addition, for some commissioning parent(s), for cultural and other reasons, they seek to conceal from the child and others, information about the child's origins.

If children are unable to access information about their genetic origins, this may also suggest unlawful discrimination. As noted above, art 2(1) CRC provides that child's rights are to be "respect[ed] and ensure[d] ... without discrimination of any kind ... [including] birth or other status."¹⁶⁵ Article 10(3) ICESCR also provides that "[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions." The inability of children born of surrogacy to access information about their identity including their genetic origins may amount to unlawful discrimination. A child should not be disadvantaged in terms of their identity on account of the fact that he or she was born to a surrogate mother. Children are not responsible for the circumstances of their birth and should not suffer adverse consequences for circumstances for which they are not responsible.

The right to identity in the surrogacy context in New Zealand

At the domestic level, New Zealand gives effect to art 8 CRC using a variety of legislative and policy measures. For example, in its 2010 Report to the Committee on the Rights of the Child, New Zealand highlighted various legislative changes and policy initiatives that recognised the legal, biological and cultural dimensions to identity.¹⁶⁶ These included:

- Cultural identity of Māori: Initiatives to foster and protect the cultural identity of Māori such as the Māori Language Strategy and Māori language revitalisation programmes.

¹⁶¹ Law Commission, above n 158, at 63.

¹⁶² Hague Conference on Private International Law *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (General Affairs and Policy of the Conference, The Netherlands, March 2014) at [187].

¹⁶³ Law Commission, above n 158, at 63.

¹⁶⁴ Law Commission, above n 158, at 63.

¹⁶⁵ CRC, art 2(1).

¹⁶⁶ Committee on the Rights of the Child *Third and fourth periodic report: New Zealand* UN Doc CRC/C/NZL/3-4 (14 June 2010) at [154]-[162].

- Policy work on legal parenthood: New Zealand referred to the 2004 report of the Law Commission on “New Issues in Legal Parenthood.”¹⁶⁷ It noted in particular the impact of social change and assisted human reproductive procedures on children and family forms, establishing and accessing information on genetic parentage and assigning legal parenthood. New Zealand noted that the Ministry of Justice was at the time scoping a work programme to address legal parenthood issues.
- The provisions of the HART Act.

Key provisions of the HART Act in the context of a child’s right to identity are:

- Section 3 sets out the purposes of the HART Act and includes the following:
 - “(a) to secure the benefits of assisted reproductive procedures, established procedures, and human reproductive research for individuals and for society in general by taking appropriate measures for the protection and promotion of the health, safety, dignity, and rights of all individuals, but particularly those of women and children, in the use of these procedures and research; ...
 - (f) to establish a comprehensive information-keeping regime to ensure that people born from donated embryos or donated cells can find out about their genetic origins.”
- Section 4 sets out the Principles which are to guide decision-makers under the Act. These principles include:
 - “(a) the health and well-being of children born as a result of the performance of an assisted reproductive procedure or an established procedure should be an important consideration in all decisions about that procedure;
 - (b) the human health, safety, and dignity of present and future generations should be preserved and promoted; and ...
 - (e) donor offspring should be made aware of their genetic origins and be able to access information about those origins.”
- Part 3 of the HART Act (Information about donors of donated embryos or donated cells and donor offspring) sets up a Register for information about donors (in operation since August 2005), and provides the framework access to this information. Once a child turns 18, they are entitled to access information about their donor.¹⁶⁸

There is no specific reference to the child’s right to identity in the ACART Guidelines. However, provisions which potentially have some bearing on realisation of the child’s right to identity include:

- At least one of the two intending parents must be a genetic parent – this will assist in practice with the child’s access to information about part of their genetic origins and identity.¹⁶⁹
- There must have been discussion, understanding and declared intentions about “any ongoing contact” between the parties. An arrangement in favour of future ongoing contact between the intending parents and the child with the surrogate mother and/or donor could assist in realisation of the child’s right to identity.¹⁷⁰

¹⁶⁷ Law Commission, above n 158.

¹⁶⁸ HART Act, s 50(1).

¹⁶⁹ ACART Guidelines, above n 33, at cl 2(a).

¹⁷⁰ ACART Guidelines, above n 33, at cl 2(a).

- ECART must be satisfied that the risks associated with a surrogacy are justified. One of the risks identified is “the health and wellbeing of a resulting child” – the wellbeing of a child could be affected in future by lack of information about identity.¹⁷¹

A surrogacy arrangement will not necessarily undermine the realisation of the right to identity. So, for example, all the parties to an altruistic surrogacy arrangement which takes place in New Zealand, with the approval of ECART, could be supportive of the child’s right to identity, and facilitate the provision of information to the child about their identity and genetic origins in due course.

On the other hand, impediments to realisation of the right to identity in the surrogacy context can arise. For example:

- Although this is no longer possible for New Zealand-based surrogacy arrangements, as there is now a register to record the donor’s information, there could be donor anonymity in international commercial surrogacy arrangements. By the time New Zealand authorities are involved in such an arrangement (at the point of immigration and adoption in New Zealand), it is effectively too late for anything to be done about this.
- In New Zealand, even if donor information is recorded on the Register, the intending parent(s) could, for cultural or other reasons, choose to conceal the circumstances of their child’s birth so that the child is never aware of the involvement of a donor and/or surrogate in their birth.

Questions about New Zealand’s current approach to the right to identity

The following questions arise in relation to New Zealand’s current approach to the child’s right to identity:

- Would it be useful for the HART Act to include more specific reference to relevant human rights such as the right to identity?
- Would it be useful for the ACART Guidelines to refer explicitly to the child’s right to identity (and indeed other rights)?
- How can provision of information about a child’s genetic origins be ensured? Should intended parent(s) in New Zealand be required to disclose the circumstances of their child’s conception to them? How could this be enforced or monitored in practice? Should there be automatic release of information once the child turns 18? How would this be achieved in practice?
- How does the requirement for intending parent(s) to adopt their child under the Adoption Act 1955 operate to inhibit or mask the realisation of the child’s right to identity?

¹⁷¹ ACART Guidelines, above n 33, at cl 2(b)(iii).

The Child's Right not to be Sold

International legal basis of the right

Article 35 CRC provides that:

“States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

The CRC-OPSC, adopted in 2002, provides greater focus on the issue of exploitation of children. Article 1 provides:

“States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.”

Article 2(a) defines the phrase ‘sale of children’ as:

“any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”

Beyond the provisions of CRC and CRC-OPSC, other relevant international legal standards include the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,¹⁷² and the Protocol against the Smuggling of Migrants by Land, Sea and Air.¹⁷³ A number of ILO conventions are also relevant including ILO 29 Forced or Compulsory Labour,¹⁷⁴ ILO 97 Migration for Employment,¹⁷⁵ ILO 105 Abolition of Forced Labour,¹⁷⁶ and ILO 182 on the Worst Forms of Child Labour.¹⁷⁷

New Zealand is a party to all of these treaties, although the focus in this section will be on the provisions of the CRC and CRC-OPSC given their direct relevance.

What does the right not to be sold require?

Article 35 CRC and CRC-OPSC are aimed at exploitative conduct. The list of prohibited acts in the CRC-OPSC (sexual exploitation, transfer of organs for profit and forced labour) clearly involve exploitation and degradation of the child.¹⁷⁸ The Preamble to CRC-OPSC refers to the context of “international traffic in children” and so adds weight to the argument that the primary aim of art 35 and the Protocol is “harmful activities that compromise the best interests of the child.”¹⁷⁹ The purpose of the CRC and

¹⁷² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2237 UNTS 319 (opened for signature 15 November 2000, entered into force 25 December 2003).

¹⁷³ Protocol against the Smuggling of Migrants by Land, Sea and Air 2241 UNTS 507 (opened for signature 15 November 2000, entered into force 28 January 2004).

¹⁷⁴ International Labour Organization Convention Concerning Forced or Compulsory Labour (No 29) 39 UNTS 55 (opened for signature 28 June 1930, entered into force 1 May 1932).

¹⁷⁵ International Labour Organization Convention Concerning Migration for Employment (No 97) 120 UNTS 71 (opened for signature 1 July 1949, entered into force 22 January 1952).

¹⁷⁶ International Labour Organization Convention Concerning the Abolition of Forced Labour (No 105) 320 UNTS 292 (opened for signature 25 June 1957, entered into force 17 January 1959).

¹⁷⁷ International Labour Organization Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182) 2133 UNTS 161 (opened for signature 17 June 1999, entered into force 19 November 2000).

¹⁷⁸ Gerber and O’Byrne, above n 156, at 97.

¹⁷⁹ Gerber and O’Byrne, above n 156, at 97.

CRC-OPSC can therefore be described as to “prevent harm to children, to protect children’s rights and to promote their best interests.”¹⁸⁰

However, despite this clear aim, the words of art 35 and CRC-OPSC are wide and all-encompassing. The drafting history of the latter also makes it clear that states wanted a broad definition of the sale of children to “cover activities beyond those contemplated at the time of drafting.”¹⁸¹ Thus, any activity which involves ‘transfer,’ ‘remuneration,’ and ‘consideration’ would appear to fall within the definition of the sale of a child and so be prohibited.¹⁸²

The right not to be sold in the surrogacy context

The right of a child not to be sold is especially relevant in the context of commercial surrogacy arrangements. At first glance, the terms of CRC and CRC-OPSC appear wide enough to clearly cover commercial surrogacy contracts. A commercial surrogacy arrangement involves a ‘transaction’ where a child is ‘transferred’ from the surrogate mother to the intending parent(s) in exchange for ‘remuneration’ beyond reimbursement for expenses. This arguably amounts to the ‘sale’ of a child.

Academic commentators disagree on whether or not commercial surrogacy arrangements are in breach of art 35 CRC and CRC-OPSC. Some are firmly of the view that commercial surrogacy arrangements are in breach of art 35 CRC and CRC-OPSC.¹⁸³ Other commentators take a different view and argue that commercial surrogacy involves remuneration to the surrogate for her services in carrying and giving birth to a child, rather than payment for purchase of a child.¹⁸⁴ A middle view is taken by Gerber and O’Byrne who argue that commercial surrogacy is “wholly different in character” to the exploitative activities covered by art 35 and CRC-OPSC.¹⁸⁵ They argue that commercial surrogacy is not about ‘sale’ or ‘transfer’ of a child, but instead about “allocation of responsibility between the parties to the arrangement as to the care of the child at different points in time, with the aim of bringing to child into its intended family.”¹⁸⁶

At the international level, the Committee on the Rights of the Child has not yet expressed a clear view on whether or not commercial surrogacy amounts to prohibited sale of children.¹⁸⁷ However, the Committee clearly harbours some concerns that at least under “certain circumstances” which it suggests involve an absence of “clear” or “proper” regulation, commercial surrogacy arrangements “may” amount to sale or “hidden sale” of children.¹⁸⁸

In early 2018, the Special Rapporteur on the sale and sexual exploitation of children issued a report that was sharply critical of commercial surrogacy. She asserted that commercial surrogacy often involves abusive practices, and that current responses to regulating commercial surrogacy involve direct challenges to the legitimacy of human rights norms by purporting to legalise practices that

¹⁸⁰ Gerber and O’Byrne, above n 156, at 97.

¹⁸¹ Tobin, above n 10, at 336-337.

¹⁸² Tobin, above n 10, at 335.

¹⁸³ See Tobin, above n 10, at 326; David Smolin “Surrogacy as Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children” (2016) 43 Pepp L Rev 265 at 303 and Sonia Allan “The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations” in Paula Gerber and Katie O’Byrne (eds) *Surrogacy, Law and Human Rights* (Routledge, London, 2016) 113 at 120.

¹⁸⁴ Jason KM Hanna “Revisiting Child-based Objections to Commercial Surrogacy” (2010) 24 Bioethics 341.

¹⁸⁵ See Gerber and O’Byrne, above n 156, at 97 and Katherine Wade “The regulation of surrogacy: a children’s rights perspective” (2017) 29 CFLQ 113 at 121.

¹⁸⁶ Gerber and O’Byrne, above n 156, at 98.

¹⁸⁷ For discussion see Baird, above n 66.

¹⁸⁸ Baird, above n 66, at 124-130.

violate the international prohibition on the sale of children.¹⁸⁹ She noted that surrogacy regulations in some jurisdictions are designed to enforce contracts, obtain children for intending parents, maintain the industry's profits, and intentionally reject most protections for children or surrogate mothers.¹⁹⁰ Ultimately, she concluded that "the essence" of the commercial surrogacy arrangement is the transfer of a child and that "[c]ommercial surrogacy as currently practised usually constitutes sale of children as defined under international human rights law."¹⁹¹

However, the Special Rapporteur did agree that "[c]ommercial surrogacy could be conducted in a way that does not constitute sale of children, if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child".¹⁹² She set out a number of conditions to be met in order for this to be more than a "legal fiction"¹⁹³ including that surrogate mothers must be accorded the status of the mother at birth, and at birth must be under no legal obligation to transfer the child. In the view of the Special Rapporteur, the physical transfer of the child "must be a gratuitous act, based on her own post-birth intentions, rather than on any legal or contractual obligation."¹⁹⁴ Thus, all payments to the surrogate must be before the post-birth transfer of the child, and must be non-reimbursable. She asserted that until clear regulatory systems are established, states should prohibit commercial surrogacy. In particular, states should not adopt commercial surrogacy regulations based on obligatory or automatic enforcement of surrogacy contracts and pre-birth parentage orders, for such would make the States "complicit in authorizing practices that constitute the sale of children."¹⁹⁵

A key point to be borne in mind in the context of this debate is that in most cases, commercial surrogacy does not result in the actual exploitation or abuse of the resulting child. In rare cases, however, it does.¹⁹⁶ There are not yet any reports of abuse or exploitation of surrogate-conceived children in New Zealand, but it is likely only a matter of time before such a case occurs.

Realising the right not to be sold in New Zealand in the surrogacy context

Article 35 and CRC-OPSC are implemented in a variety of ways in New Zealand's legislative framework including:

- the Films, Videos and Publications Classification Act 1993;
- the Prostitution Reform Act 2003;
- the Crimes Act 1961; and
- the Adoption Act 1955 (ss 27A-27D).

¹⁸⁹ United Nations Human Rights Council *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* UN Doc A/HRC/37/60 (15 January 2018) at [24].

¹⁹⁰ At [33].

¹⁹¹ At [41].

¹⁹² At [72].

¹⁹³ At [72] and [75].

¹⁹⁴ At [72].

¹⁹⁵ At [75].

¹⁹⁶ See for example *Huddleston v Infertility Center of America Inc*, above n 117; *Farnell & Anor v Chanbua*, above n 117; and *DPP v McIntosh* [2016] VCC 622.

A number of policy measures also serve to implement New Zealand's obligations under CRC-OPSC such as the National Plan of Action against the Commercial Sexual Exploitation of Children, the Children's Action Plan and the Plan of Action to Prevent People Trafficking.¹⁹⁷

Arguably, s 14(3) of the HART Act also implements (even if unintentionally) the prohibition on the sale of children by making commercial surrogacy contracts illegal. However, as discussed above, there is an unresolved debate as to whether all commercial surrogacy contracts violate international law, or whether they may be permissible in certain circumstances and under certain conditions.

This issue also arises implicitly in New Zealand in the context of international commercial surrogacy arrangements. Even though there is a prohibition on commercial surrogacy arrangements in s 14(3) of the HART Act, this does not have extraterritorial effect. New Zealand intending parent(s) therefore enter into international commercial surrogacy arrangements which are implicitly tolerated by the New Zealand courts who recognise such arrangements via a subsequent adoption order in the Family Court. As noted by Judge Ryan however, the policy considerations underlying the prohibition on commercial surrogacy in the HART Act are not within the ambit of a Family Court judge hearing an adoption application following an international surrogacy arrangement.¹⁹⁸

Questions about New Zealand's current approach to the right not to be sold

The following questions arise in relation to New Zealand's current approach to the child's right not to be sold:

- Does New Zealand's current practice of implicitly condoning international commercial surrogacy arrangements by making adoption orders in favour of New Zealand intending parent(s) breach art 35 CRC and CRC-OPSC?
- Should New Zealand prohibit international commercial surrogacy arrangements involving New Zealand citizens or permanent residents residing in New Zealand by giving s 14(3) of the HART Act extraterritorial effect, in order to better comply with art 35 and CRC-OPSC?
- On the other hand, if New Zealand was to amend s 14 of the HART Act so as to permit commercial surrogacy arrangements in New Zealand, would this lead to a breach of art 35 CRC and CRC-OPSC?
- Should New Zealand explicitly seek the views of the Committee on the Rights of the Child via its next periodic state report (due in May 2021) on whether and in what circumstances commercial surrogacy arrangements breach art 35 CRC and CRC-OPSC?¹⁹⁹

¹⁹⁷ For more on general measures of implementation see Committee on the Rights of the Child *Consideration of reports submitted by States parties under article 12(1) of the Optional Protocol on the Rights of the Child on the sale of children, child prostitution and child pornography: New Zealand* UN Doc CRC/C/OPSC/NZL/1 (20 January 2016).

¹⁹⁸ *Re KR Application to Adopt* [2011] NZFLR 429 at [20]. See discussion in Debra Wilson "Surrogacy in New Zealand" [2016] NZLJ 401 at 409.

¹⁹⁹ Note however that the Committee failed to engage with a US assertion that commercial surrogacy did not breach art 35 CRC-OPSC because it was not exploitative. For discussion see Baird, above n 66, at 128-129.

PART FOUR: RIGHTS OF THE INTENDED PARENT(S)

Introduction

There is no particular international human rights treaty that directly addresses the human rights of intended parent(s), and the only individual right that is clearly engaged is the right to freedom from discrimination.

Nevertheless, arguments have been advanced that intended parent(s) have the right to reproduce, and the right to benefit from scientific advances. These rights have no clear source in international human rights law, but some recognition as arising out of other recognised human rights. Typically, it is the discriminatory access to human reproduction and scientific development that is at stake.

The Intended Parent(s)' Right to Reproduce

International legal basis of the right

There is no internationally recognised right to reproduce. Instead, this position is usually based on one or more of the following international human rights:²⁰⁰

- the right to marry and found a family;
- the right to health; or
- the right to respect for private and family life.

The right to freedom from discrimination in accessing fertility treatment is also engaged.

In New Zealand, the 'right to reproduce' is given effect through the HART Act, ECART procedures and state funding of fertility treatment.

The potential legal bases are now set out.

The right to marry and found a family

The right to marry and found a family is recognised in art 16 UDHR and art 23 ICCPR. International jurisprudence on this right typically focuses on preventing forced marriages, and allowing planned families. This is sometimes argued to extend to the right to fertility treatment.²⁰¹

The right to marry and found a family includes ensuring that free and full consent is obtained, transparency in any restrictions on marriage due to special factors such as kinship or incapacity, a process for marriage registration, and equality of rights and responsibilities of spouses.²⁰² Most relevantly:²⁰³

²⁰⁰ Tobin, above n 10, at 323.

²⁰¹ *Gretel Artavia Murillo v Costa Rica* IDH Serie C No 257 12.361.

²⁰² United Nations Human Rights Committee *General Comment No 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses* XXXIX (27 July 1990) [GC19].

²⁰³ At [5].

“The right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.”

The HRC issued General Comment 19 on the scope of art 23 in 1990. General Comment 19 does not mention rights associated with access to assisted reproductive treatment, or surrogacy, although this is likely because these issues were barely on the horizon at the time.

The right to health

Infertility may be understood as an illness or as a disability. To the extent that it is an illness, then the right to health is engaged. The right to health is recognised in art 25 UDHR and art 12(1) ICESCR. The right to health was discussed in **Part Two** in relation to the rights of the surrogate.

The right to health includes a number of freedoms, and in particular the freedom to control one’s health and body, sexual and reproductive freedom, the freedom from forced medical treatment and the freedom from torture or other cruel, inhuman or degrading treatment.²⁰⁴

The ICESCR provides for progressive realisation of the rights protected, including the right to health, and acknowledges the constraints on states placed by limits in availability of resources.²⁰⁵ States are immediately obliged to take deliberate, concrete and targeted steps towards realisation of the rights and to guarantee that the rights are exercised without discrimination.²⁰⁶

The right to privacy

The right to privacy was discussed in **Part Two** on the rights of the surrogate, and similar considerations apply to intended parent(s).

The most relevant iteration of the right to privacy is art 17 ICCPR, which states that: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”.²⁰⁷ Complaints about breaches of art 17 often also invoke the rights to non-discrimination (arts 2 and 26 ICCPR) and family life (art 23 ICCPR).

The right to privacy is directly relevant to sexual and reproductive matters and has been invoked in HRC proceedings under the individual complaint mechanism related to the criminalisation of homosexuality²⁰⁸ and denial of access to lawful abortion.²⁰⁹

The right to privacy is not absolute. The text of art 17 allows for limitations provided that they are not unlawful or arbitrary. The HRC has stated that, although limitations on the right to privacy are

²⁰⁴ United Nations Committee on Economic, Social and Cultural Rights *General Comment No 14: The right to the highest attainable standards of health*, above n 20, at [8].

²⁰⁵ ICESCR, art 2.

²⁰⁶ ICESCR, art 2.

²⁰⁷ ICCPR, art 17(1).

²⁰⁸ See for example *Toonen v Australia*, above n 45.

²⁰⁹ *VDA v Argentina*, above n 46; and *KL v Peru*, above n 46.

permissible if they are in accordance with the law, any law that limits the right must itself be consistent with the aims and objectives of the ICCPR.²¹⁰

What does the right to reproduce require?

As well as the precise legal status, the nature of obligations associated with the right to reproduce is disputed. In scholarship, some argue that the right to reproduce may only be exercised by those who can naturally reproduce.²¹¹ Others reject the inclusion of reproductive treatment under the right due to fear of introducing positive obligations upon the state to provide access to it.²¹² The most common position is that the significance of reproducing is universal and therefore reproduction in all its forms should be protected.²¹³

The ECtHR has confirmed that the right to respect for private life includes respect for decisions both to have and not to have a child and that “the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by [the right to privacy] as such a choice is an expression of private and family life”.²¹⁴

Limitations on the right to reproduce (and the subsequent state obligation of non-interference) may properly exist in some instances where there is either a broad social effect or a high risk of substantial harm to the child.

The ECtHR has found that there is no absolute right to adopt and receive a child, including by surrogacy.²¹⁵ By contrast, the Inter-American Court of Human Rights has held that Costa Rica's prohibition on IVF constituted a breach of the right to reproduce.²¹⁶ The jurisprudence of these courts is not binding on New Zealand.

Application to the surrogacy context

The right to reproduce, if recognised, could lead to an argument that intended parent(s) have a right to access surrogacy. This argument could have three aspects:

- the right to access fertility treatment to create a surrogate pregnancy;
- the right to form surrogacy contracts to regulate the arrangement; and
- the right to state funded fertility treatment to create a surrogacy.

There is an obvious interaction with the right to freedom from discrimination, particularly related to access to fertility treatment for particular groups. In New Zealand it is illegal to discriminate on the grounds of sex, marital status and sexual orientation.²¹⁷ Surrogacy may therefore not be denied for

²¹⁰ United Nations Human Rights Committee *General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* XXXII (8 April 1988) at [3]-[4].

²¹¹ Radhika Rao "Equal Liberty: Assisted Reproductive Technology and Reproductive Equality" (2008) 76 *Geo Wash L Rev* 1457.

²¹² Andrea Carroll "Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy" (2013) 88 *Indiana LJ* 1187 at 1196.

²¹³ John A Robertson *Children of Choice* (Princeton University Press, Princeton, 1994) at 32.

²¹⁴ *SH and Others v Austria* (2011) 52 EHRR 6 (ECtHR) at [80].

²¹⁵ *EB v France* Grand Chamber ECHR 43546/02, 22 January 2008 at [41].

²¹⁶ Ligia M De Jesus "Artavia Murillo v Costa Rica: The Inter-American Court on Human Rights' Promotion of Non-Existent Human Rights Obligations to Authorize Artificial Reproductive Technologies" (2014) 18 *UCLA J Int'l L Foreign Aff* 275 at 276-277.

²¹⁷ Human Rights Act 1993, s 21(1).

these reasons. If state funding is available for such assisted reproduction, then it should be available in a non-discriminatory manner.

Realising the right to reproduce in New Zealand

It cannot be said unequivocally that there is a right to reproduce in New Zealand law. There is no right to reproduce in NZBORA, and neither is there inclusion of foundational rights such as the right to health or the right to found a family. The right to privacy is recognised in New Zealand law as part of NZBORA.

In New Zealand, the right to marry and form a family is the basis of the laws on marriage equality²¹⁸ and adoption equality.²¹⁹ This means that people of all genders and sexual orientations should have the ability both to marry and to adopt children.

Section 19 of NZBORA recognises the right to freedom from discrimination on the grounds in the Human Rights Act 1993. The prohibited grounds of discrimination include marital status, disability, age, and sexual orientation.²²⁰ As sexual orientation is a prohibited ground of discrimination, same sex couples have the same rights to access artificial reproductive procedures as other individuals.

Certain types of reproductive activities, including any surrogacy that utilises assisted reproductive procedures,²²¹ can only take place with ethics approval from ECART. Each application for surrogacy is determined on a case by case basis with reference to the ACART Guidelines. The ACART Guidelines require ECART to weigh up a series of relevant factors and consider whether any surrogacy may go ahead. ECART consent is nearly always given.²²²

Access to assisted reproductive procedures is not addressed by the HART Act. There are no particular express limitations on access, such as medical infertility or restrictions to married couples, or people of sound mental health. The ACART Guidelines on surrogacy do create some restrictions. They require that one or both of the intended parents has a genetic link to the proposed child, and that the parties are not proposing surrogacy purely as a matter of social choice or personal convenience.²²³

There has been little judicial consideration of the legitimacy of any limitation in access to reproductive health treatment, including surrogacy, in New Zealand. Evidence of challenges in accessing assisted reproductive treatment is primarily anecdotal.²²⁴

There may also be medical reasons which prevent fertility providers from providing assisted reproductive treatment to particular people. In *CBA v LKJ*, a 45-year old single woman with mental health issues claimed that her fertility provider's refusal to provide her with assisted reproductive

²¹⁸ The Marriage (Definition of Marriage) Amendment Act 2013, amended the definition of marriage to read "marriage means the union of 2 people, regardless of their sex, sexual orientation, or gender identity": Marriage Act 1955, s 2(1).

²¹⁹ By including same sex couples in the definition of 'spouses', the adoption law automatically applied.

²²⁰ Human Rights Act 1993, s 21(1).

²²¹ ECART consent is not required if the surrogate's pregnancy is accomplished without medical assistance.

²²² See the ECART statistics referred to in the Introduction above.

²²³ ACART Guidelines, above n 33.

²²⁴ For example, the Sunday Star Times in August 2019 interviewed a male same-sex couple who had established a Givealittle campaign to fund \$25,000 for IVF treatment for a surrogate. See Hannah Martin "Gay couple have to raise \$25,000 for IVF; want fertility treatment funded for same-sex couples" *The Sunday Star Times* (online ed, 11 August 2019). See also "'Why should I be punished for his mistakes?': Women's plea to have IVF baby with jailed husband" *The New Zealand Herald* (online ed, 4 May 2017).

treatment breached the Human Rights Act 1993.²²⁵ The Human Rights Review Tribunal (HRRT) found that the fertility provider's overall failure to provide treatment to the woman constituted discrimination but that the discrimination was not unlawful. The HRRT took into account the fertility service's legal obligations under the NZS8181 *Fertility Services* principles and the Health and Disability Services (Safety) Act 2001, two legal documents underpinned by the s 4 principles of HART, the Code of Health and Disability Services Consumers' Rights and the common law duty for medical practitioners to comply with a standard of reasonable care and skill.

Questions about New Zealand's current approach to the right to reproduce

The following questions arise in relation to New Zealand's current approach to the intended parents' right to reproduce:

- Is the ACART requirement of a genetic connection between at least one intended parent and the surrogate-born child justified?
- Should surrogacy be limited to people experiencing medical or social infertility?
- Is state funding of reproductive treatment discriminatory?
- Should surrogacy contracts be enforceable?
- Should there be provision for state-funding of the costs of surrogacy (beyond the assisted reproductive treatment)?

²²⁵ *CBA v LKJ* [2014] NZHRRT 13.

The Intended Parent(s)' Right to Science

One under-explored aspect of the rights of intended parent(s) in the surrogacy context is the right to share in the benefits of scientific advancement.

The international legal basis of the right

The 'right to science' is found in art 27 UDHR as follows:

- “(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

Subsequently, art 15 ICESCR provided that:

- “1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
- 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
- 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
- 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.”

Despite this recognition, the right to share in the benefits of science (or the 'right to science' as it is sometimes known) has been described as the “Sleeping Beauty” of human rights.²²⁶ In 2009, one commentator noted that the right to science was “so obscure and its interpretation so neglected that the overwhelming majority of human rights advocates, governments, and international human rights bodies appear to be oblivious to its existence.”²²⁷ Since 2009, there has been growing interest from international mechanisms in the right to science. In 2009, UNESCO held an experts' meeting on the right,²²⁸ and in 2012 Farida Shaheed, the Special Rapporteur in the field of cultural rights, reported on the normative content of the right to enjoy the benefits of scientific progress and its applications.²²⁹

²²⁶ Māmari Stephens “Rights to Culture, Language and Education – A Tricephalos” in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 737 at 745, citing E Riedel “Sleeping Beauty or Let Sleeping Dogs Lie?: The Right of Everyone to Enjoy the Benefits of Scientific Progress and Its Applications (REBSPA)” in H Hestermeyer and others (eds) *Coexistence, Cooperation and Solidarity* (Martinus Nijhoff Publishers, Leiden, 2011) 503 at 503.

²²⁷ Audrey Chapman “Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications” (2009) 8(1) *Journal of Human Rights* 1 at 1.

²²⁸ UNESCO *Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and Its Applications* UN Doc SHS/RSP/HRS-GED/2009/PI/H/1 (16-17 July 2009).

²²⁹ United Nations Human Rights Council *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: the right to enjoy the benefits of scientific progress and its applications* UN Doc A/HRC/20/26 (14 May 2012).

In April 2020, CESCR adopted a general comment on “Science and economic, social and cultural rights.”²³⁰

What does the right to science require?

‘Science’ is a complex phenomenon to be the subject of a human right.²³¹ There is not yet any international consensus as to what a human rights approach to science entails, let alone specification of the kinds of obligations this right imposes on states.²³² However, in her 2012 report, the Special Rapporteur in the field of cultural rights noted that the right to science is usually regarded as a means to advance the realisation of other human rights and to address “the needs common to all humanity.”²³³ She identified the normative content of the right as including:

- access by everyone without discrimination to the benefits of science and its applications, including scientific knowledge;
- opportunities for all to contribute to the scientific enterprise and freedom indispensable for scientific research;
- participation of individuals and communities in decision-making and the related right to information; and
- an enabling environment fostering the conservation, development and diffusion of science and technology.

One of the complexities with the right to science is that science can work to both promote and undermine human rights. At the time of the drafting of ICESCR in the 1950s, the relationship between science and human rights was viewed quite positively, but by the 1970s, science came to be seen as a threat to human rights.²³⁴ Concerns included the impact of electronic communications and computer data systems on the right to privacy, and the risks to human rights through medical advances such as artificial insemination.²³⁵ Thus, the 1975 Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind presented science as a resource to promote the realisation of human rights,²³⁶ but also expressed concerns that science not be used to the “detriment of human rights and freedoms and the dignity of the human person.”²³⁷

In terms of sharing the benefits of science, art 15 of the Universal Declaration on Bioethics and Human Rights 2005, adopted under the auspices of UNESCO, states that “benefits resulting from any scientific research and its applications should be shared with society as a whole and within the international community, in particular with developing countries”.²³⁸ The drafting history of art 15 suggests that the term “benefits” is to be understood as material benefits that every person should be able to enjoy in

²³⁰ United Nations Committee on Economic, Social and Cultural Rights *General Comment No 25: Science and Economic, Social and Cultural Rights* UN Doc E/C.12/GC/25 (7 April 2020).

²³¹ Stephens, above n 226, at 745.

²³² Chapman, above n 227, at 3.

²³³ United Nations Human Rights Council *Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: the right to enjoy the benefits of scientific progress and its applications*, above n 229, at [2].

²³⁴ Chapman, above n 227, at 2.

²³⁵ Chapman, above n 227, at 2.

²³⁶ *Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind* GA Res 3384 (1975), art 7.

²³⁷ At art 8.

²³⁸ UNESCO Universal Declaration on Bioethics and Human Rights UN Doc SHS/EST/BIO/06/1 (19 October 2005), art 15.

everyday life.²³⁹ This therefore requires states to distribute the applications of scientific progress to everyone. However, there is a clear tension between the public interest in the benefits of science being shared by all, and the private interest in the intellectual property interests generated by scientific research.

The right to science has clear links to other rights including the right to health. Article 15(1)(b) ICESCR has been described as clearly involving progress in matters of health science.²⁴⁰ However, scientific advances are often driven by market considerations which can ultimately have a negative impact on the right to health. The 2009 Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and Its Applications notes that:²⁴¹

“Scientific advances in medicine have helped to cure more diseases and enhance the quality of life. However, these advances are driven primarily by market considerations that often do not correspond to the health needs of the world’s population as a whole, thus affecting the right to health.”

Finally, it is worth noting that art 7 ICCPR recognises the potential hazards of science. In addition to no one being subject to torture or to cruel, inhuman or degrading treatment or punishment, “no one shall be subjected without his free consent to medical or scientific experimentation.”

The right to science in the surrogacy context

In the surrogacy context, the right to science has been primarily used to support intended parent(s)’ asserted right to reproduce and found a family. However, there has been no detailed analysis of the right in the surrogacy context. Rather, the invoking of the right seems to depend on an assertion that the right to enjoy the benefits of scientific progress and its applications means a right of access by intended parent(s) to the material benefits of artificial reproduction technologies like surrogacy.

There has been limited further analysis of the scope and content of the right beyond that bland assertion, and many questions remain unanswered. What are the limits of the right? If a state prohibits access to surrogacy, is that a breach of intended parent(s) right to science? If a state prohibits commercial surrogacy and/or international surrogacy, is that a breach of intended parent(s) right to science? Is a state obliged to proactively facilitate access to surrogacy and other ARTs? How do the concepts of progressive realisation and maximum available resources apply in the surrogacy context?

The right to science in the surrogacy context in New Zealand

In common with other ESC rights, there is no statutory recognition of the right to science in New Zealand. In addition, the right to science in New Zealand has received little attention or commentary either at the domestic level or via international monitoring mechanisms. In its 2017-2018 engagement with CESCR, neither New Zealand in its state report nor the Committee in its concluding observations

²³⁹ Chapman, above n 227, at 9.

²⁴⁰ Margaret Bedggood and Kris Gledhill “The Essentials of Life” in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 683 at 721.

²⁴¹ UNESCO *Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and Its Applications*, above n 228, at 13.

made any comment on New Zealand's implementation of art 15 ICESCR.²⁴² In earlier engagements with CESCR, New Zealand referred to a number of initiatives to illustrate its implementation of the right to science. In its 2009 report, New Zealand listed a number of statutes including the HART Act that "seek to uphold human rights with duties, powers and obligations for those concerned with scientific practice".²⁴³

Unsurprisingly, the right to science in the surrogacy context in New Zealand has received virtually no attention.

Questions about New Zealand's current approach to the right to science

The following questions arise in relation to New Zealand's current approach to the intended parents' right to science:

- Do any limitations on access to surrogacy (for example any prohibition on surrogacy, prohibition on commercial surrogacy, prohibition on international surrogacy) interfere with intended parent(s) right to science?
- Is New Zealand obliged to proactively facilitate access to surrogacy (and other ARTs) in order to meet its obligations to fulfil the right to science?

²⁴² CESCR *Fourth periodic report submitted by New Zealand under articles 16 and 17 of the Covenant* UN Doc E/C.12/NZL/4 (6 October 2017); CESCR *Concluding observations on the fourth periodic report of New Zealand* UN Doc E/C.12/NZL/CO/4 (1 May 2018).

²⁴³ CESCR *Third periodic report submitted by States parties under articles 16 and 17 of the Covenant* (New Zealand) UN Doc E/C.12/NZL/3 (17 January 2011) at [743].

PART FIVE: QUESTIONS REQUIRING CONSIDERATION

Introduction

In this Part, we collate the questions from **Parts Two-Four**. We suggest that in any future New Zealand law reform exercise concerning surrogacy that the questions below need to be considered and addressed. This will help to ensure a human rights-based approach to surrogacy.

Rights of the Surrogate

Questions about New Zealand's current approach to the right to health

The following questions arise in relation to New Zealand's current approach to the surrogate's right to health:

- How can New Zealand best respect, protect, and fulfil the surrogate's rights to psychological and social support during the pregnancy and after the birth?
- How can New Zealand promote clinical decision-making in relation to surrogate pregnancies that minimises physical and psychological risks to the surrogate?
- How can New Zealand best respect, protect, and fulfil the surrogate's right to exercise control over her body during the pregnancy and birth?
- If s 14 of the HART Act were amended or repealed such that surrogacy contracts could be enforced, how would the surrogate's rights to exercise control over her body during the pregnancy and birth be protected?
- What could New Zealand do to facilitate rights-consistent processes and procedures in hospitals for surrogate births?

Questions about New Zealand's current approach to the right to privacy

The following questions arise in relation to New Zealand's current approach to the surrogate's right to privacy:

- What justifications can the New Zealand government offer for the limitation on the surrogate's right to enter into an enforceable surrogacy contract?
- What justifications can the New Zealand government offer for the limitation on the surrogate's right to enter into a paid surrogacy arrangement?
- Do these justifications meet the criteria for legitimate limitation on international human rights?
- Do these justifications constitute unjustified discrimination against surrogates?
- What are the fundamental values of the New Zealand community in relation to surrogacy?

Questions about New Zealand's current approach to the surrogate's employment rights

The following questions arise in relation to New Zealand's current approach to the surrogate's employment rights:

- How can New Zealand employment law protect the needs of surrogates for postnatal recovery?
- How can New Zealand employment law prevent discrimination against surrogates?

- If it were accepted that commercial surrogacy could take place in New Zealand, how should the work be valued?
- If it were accepted that commercial surrogacy could take place in New Zealand, how would the issues around pay-equity that arise in other gender-segregated industries be avoided?

Rights of the Child

Questions about New Zealand's current approach to the best interests of the child

The following questions arise in relation to New Zealand's current approach to the best interests of the child:

- How should the best interests of the child be promoted in any surrogacy law reform?
- Whether the guiding principles applying to decision makers under the HART Act (currently reflected in s 4) should explicitly include the best interests of the child?
- Whether the Adoption Act 1955 and the Status of Children Act 1969 should include reference to the best interests of the child?
- Whether Oranga Tamariki's current screening procedures for intended parent(s) as adoptive applicants are adequate?

Questions about New Zealand's current approach to the right to nationality

The following questions arise in relation to New Zealand's current approach to the child's right to nationality:

- Should New Zealand create a unique visa category for children born of an international surrogacy arrangement with New Zealand resident intending parent(s) who seek to bring the child into New Zealand after birth overseas?
- Should New Zealand amend the Citizenship Act 1977 to explicitly recognise children born of an international surrogacy arrangement with New Zealand commissioning parent(s) as automatically entitled to New Zealand citizenship? Should there be a genetic link to one or both of the commissioning parent(s)?
- If a unique visa category and/or unique citizenship recognition is created for children born of an international surrogacy arrangement? What sort of requirements/checks are required to guard against sale or trafficking in children?
- Should New Zealand ratify the 1954 Convention relating to the Status of Stateless Persons to strengthen its protection for stateless persons (including children born stateless as a result of an international commercial surrogacy arrangement)?
- Should New Zealand strengthen its legislative framework for protecting stateless persons (including children born stateless as a result of an international commercial surrogacy arrangement) by establishing a specific statelessness determination procedure?

Questions about New Zealand's current approach to the right to identity

The following questions arise in relation to New Zealand's current approach to the child's right to identity:

- Would it be useful for the HART Act to include more specific reference to relevant human rights such as the right to identity?

- Would it be useful for the ACART Guidelines to refer explicitly to the child's right to identity (and indeed other rights)?
- How can provision of information about a child's genetic origins be ensured? Should intended parent(s) in New Zealand be required to disclose the circumstances of their child's conception to them? How could this be enforced or monitored in practice? Should there be automatic release of information once the child turns 18? How would this be achieved in practice?
- How does the requirement for intending parent(s) to adopt their child under the Adoption Act 1955 operate to inhibit or mask the realisation of the child's right to identity?

Questions about New Zealand's current approach to the right not to be sold

The following questions arise in relation to New Zealand's current approach to the child's right not to be sold:

- Does New Zealand's current practice of implicitly condoning international commercial surrogacy arrangements by making adoption orders in favour of New Zealand intending parent(s) breach art 35 CRC and CRC-OPSC?
- Should New Zealand prohibit international commercial surrogacy arrangements involving New Zealand citizens or permanent residents residing in New Zealand by giving s 14(3) of the HART Act extraterritorial effect, in order to better comply with art 35 and CRC-OPSC?
- On the other hand, if New Zealand was to amend s 14 of the HART Act so as to permit commercial surrogacy arrangements in New Zealand, would this lead to a breach of art 35 CRC and CRC-OPSC?
- Should New Zealand explicitly seek the views of the Committee on the Rights of the Child via its next periodic state report (due in May 2021) on whether and in what circumstances commercial surrogacy arrangements breach art 35 CRC and CRC-OPSC?²⁴⁴

Rights of the Intended Parent(s)

Questions about New Zealand's current approach to the right to reproduce

The following questions arise in relation to New Zealand's current approach to the intended parent(s)' right to reproduce:

- Is the ACART requirement of a genetic connection between at least one intended parent and the surrogate-born child justified?
- Should surrogacy be limited to people experiencing medical or social infertility?
- Is state funding of reproductive treatment discriminatory?
- Should surrogacy contracts be enforceable?
- Should there be provision for state-funding of the costs of surrogacy (beyond the assisted reproductive treatment)?

Questions about New Zealand's current approach to the right to science

The following questions arise in relation to New Zealand's current approach to the intended parent(s)' right to science:

²⁴⁴ Note however that the Committee failed to engage with a US assertion that commercial surrogacy did not breach art 35 CRC-OPSC because it was not exploitative. For discussion see Baird, above n 66, at 128-129.

- Do any limitations on access to surrogacy (for example any prohibition on surrogacy, prohibition on commercial surrogacy, prohibition on international surrogacy) interfere with intended parent(s) right to science?
- Is New Zealand obliged to proactively facilitate access to surrogacy (and other ARTs) in order to meet its obligations to fulfil the right to science?

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